

THE OBLIGATIONS OF THE SELLER AS
REGARDS THE CONFORMITY OF THE GOODS
IN THE UNIFORM LAW ON INTERNATIONAL SALES

by

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To my father

A C K N O W L E D G M E N T S

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C O R R I G E N D A

Page 47: Delete footnote 13 and insert: "(a) Cammel Laird & Co. v. Manganese Bronze & Co. Ltd. [1934] A.C.402, p.430, per Lord WRIGHT. (b) B.S. Brown, Ltd. v. Craiks, Ltd. [1970] 1 All E.R.823, p.825; [1970] W.L.R.752, p.754, per Lord REID."

Page 79: lines 19 *et seq.*, after: "a party knew or ought to have known", ... insert: "refers to what should have been known to a reasonable person in the same situation."

investigation). Some problems relating to the appropriate method for the interpretation of the Uniform Laws by municipal courts are, also, discussed and several approaches are outlined.

The second part (Chapter One) is devoted to analysis of the rules and problems in the subject "lack of conformity". In this part are discussed in detail the features which render the goods in a sale contract defective as to quantity or quality, not possessing the qualities and characteristics contemplated by the contract, or not corresponding to the description according to the parties' agreement, or rendering the goods unsuitable for an ordinary or a commercial use or for a particular purpose according to the circumstances. The crucial question as to the time when the goods have to be in conformity is, also, examined in combination with the passing of risk. Finally, the restrictions put on the meaning of the term nonconformity are discussed on the basis that any defect must be substantial to be considered as such.

In the third part of this study (Chapter Two), the method of examination for the ascertainment of defects is considered. These rules have been put down by the Law so as to impose on the buyer a duty to examine the goods and give notice to the seller without delay. There appear some complexities in regard to this matter, which are examined here, namely the problems relating to defects not discoverable at first (latent defects), the place and date of the examination and other relevant questions. Further, there is discussed the application of the principles "gross negligence" and "good faith" to a contract of this character which may alter the normal results of the parties' relations.

The last part of this thesis (Chapter Three) is devoted to an examination of the remedies available to the buyer. The remedies, of specific performance, reduction of the price, a claim for damages and especially avoidance of the contract (on the ground of a fundamental breach of the contract), are not, however, afforded to the buyer by the Law without limits, and these questions need a relevant discussion.

Finally, some concluding remarks are made regarding the questions examined in this research.

Throughout the investigation of the aforementioned problems legal material from the British judicial practice and the legal literature relating to the Sale of Goods Act, 1893 is used. Some comparative materials are also cited, taken from various legal systems.

I N T R O D U C T I O N

I N T R O D U C T I O N

I. BACKGROUND TO THE UNIFORM LAWS

The need for the development of a legal system relating to the regulation of the exchange of commodities is as old as the starting point of man's activities in other sections of his primitive social life. It stretches back to the very starting point of man's creation of social life, for it is closely connected with the existence of human beings in the universe. However, the existence and functioning of the legal systems of those days were very simple. There were only a few rules regulating the exchange of basic goods. In the distant past of ancient Greek and Roman societies the rules relating to the sale of goods were very simple consisting of some special customs and usages. In some of those societies originally there was even unknown the basic element of the modern market for the exchange of commodities, i.e. the existence of money, and instead of this the sale and purchase was made merely by the means of exchange. The main feature of the Roman Law system for buying and selling, for example, lies in the obligation of the seller which is directed not at transferring the ownership of the goods handed over, but aims at the surrender of the possession of them to the buyer, "*qui vendidit necesse non habet fundum emptoris facere*".¹ This simple way of functioning of the market continued until the medieval period in Europe. The practical working of the system of the sale of goods of that period was accomplished by the "meeting together of people for the purchase and sale of provisions or live stock, publicly exposed, at a fixed time and place", as has been

¹ G. PETROPOULOS, Roman Law, 4th ed. (1948), para.107, A VI 2.

defined epigrammatically the meaning of the term "market".² The "fair"³ in the commercial life of medieval England was such a typical meeting with special courts for solutions of disputes in which the judges were appointed from the committee of merchants who attended the "fair". *"It is clear from the records of the courts of these fairs that they were of the same type as the courts of similar fairs which existed all over Europe",⁴* at that time.

The existence of small and simple societies in the ancient and medieval world and the limited economic life of those periods justifies the autonomous and self-sufficient close system for the functioning of the "market" as "the meeting together of people for the purchase and sale of provisions or live stock, publicly exposed at a fixed time and place". Nowadays the form of social life has been completely changed and the internationalisation of life in any section of man's activities has become much more than a reality, especially in the area of the trade relations with the exchange of commodities which is spread at a global level. From the nations' simple trade customs and usages which were developed in their courts the commercial law started to be created in a practical style throughout the world. The exchange of ideas between nations with other elements of culture and civilisation facilitated a great deal the exchange of trade rules and usages in the world by means of their adoption of those which they thought were useful and practical in their national trade. This effort of the nations became more successful after the start of creating a system of comparative law studies in the field of international commercial law, in the sense of simultaneous

² OXFORD UNIVERSAL DICTIONARY, 3rd ed., p.1203.

³ HOLDSWORTH, A History of English Law, vol.V, pp.103-104.

⁴ HOLDSWORTH, supra, vol.I, p.536.

study of several systems and different legislations, in order to ascertain similarities, differences and relations between the various legal systems and therefore to achieve a unification in the area of the law as being the dictation of the modern style of life. Nowadays, we have a complexity of national legal systems in the world and, at the same time, an urgency for a unification of the legislation of the law of sales, in particular, at a global level because of the internationalisation of commercial life. The movement towards unification in this subject of law becomes stronger because, as has been pointed out:⁵

"in no other major branch of law is there more uniformity among the principal legal systems of the world than in the law of international sales. Contract law relating to documentary transactions, the law of carriage of goods by sea, rail and air, the law of marine insurance, and the law of bank credits and acceptances, are basically the same in their general character - so far as international sales are concerned - in the so-called common law and civil law systems, as well as in the legal systems of the centrally planned economies of the Soviet Union, Eastern Europe and China."

On the other hand, the rules relating to sale contracts are undoubtedly the most live part of property law in most of the modern legal systems in the world.

In the demand for unification of the law for international sales great international lawyers and law-makers offered their experience over the centuries, and the result of their response to this demand was the development of such universal legal institutions, as the c.i.f. contract, the bill of lading, the marine insurance policy and certificate, the bill

⁵ Prof. H. BERMAN, "The Uniform Law on International Sale of Goods: A Constructive Critique" in LAW AND CONTEMPORARY PROBLEMS, vol.30 (1965), p.354.

of exchange and letter of credit etc.⁶ However, the aforementioned legal institutions were not enough to cover the wide field of the law of international sales, and hence, a special effort started to come in reality towards this effect over forty-six years ago, in April 1930, when the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT), appointed a representative Committee to prepare a Draft Uniform International Law on International Sales, under the auspices of the League of Nations. This effort had to be suspended during the second World War of 1939-45. Nevertheless, the above Committee had presented to the League of Nations two reports by the first year of the War. Some years later, after the end of the War, when the European countries started to recover their normal international relations by the means of international conferences, the 7th Session of the Hague Conference of Private International Law (hereinafter cited as "The Conference"), was convened at the Hague in October 1951. This Session decided to appoint a Special Commission of experts to examine the possibility of a Draft Uniform Law on International Sales. The Special Commission presented, in 1956, a Revised Draft to the Netherlands Government and, meanwhile, there was another group of experts in Rome, under the International Institute for the Unification of Private Law (the Rome Institute, which was the sponsoring organisation of the Conference), which had prepared a Draft Uniform Law on the Formation of Contracts for the International Sales. From these two sources, brought together at the Hague in April 1964, emerged the two Conventions, the first, the Convention relating to a Uniform Law on the International Sale of Goods (hereinafter referred to as "The Sale Convention"), and the

⁶ See H. BERMAN, *supra*, p.354.

second, the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (hereinafter referred to as "the Formation Convention"). It will be recalled that 16 Governments and the International Chamber of Commerce submitted observations on the 1956 Draft and that 28 States took part in the Final Conference held at The Hague from April 2 to 24, 1964, while four other countries and a number of International organisations were represented by observers.⁷

The aforementioned Conventions would implement the Uniform Law on International Sale of Goods, the first, (hereinafter referred to as the "ULIS"), and the Uniform Law on the Formation of Contracts for the International Sale of Goods, the second, (hereinafter referred to as the "ULFIS").

However, the Uniform Laws have been ratified by only a few States, among them the United Kingdom,⁸ to date. The ULIS has been

⁷ The Governments of the following 28 States were represented at the Conference: Austria, Belgium, Bulgaria, Colombia, Denmark, Federal Republic of Germany, Finland, France, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Vatican City and Yugoslavia. The United States of America, although it took no part in the preparatory work and was not one of the 40 Governments who were members of the Rome Institute, for the first time participated in this work. The States of Argentina, Mexico, South Africa and Venezuela were represented by observers at the Conference. The following intergovernmental organisations were also represented by observers: Council of Europe, European Economic Community, Hague Conference on Private International Law, International Institute for the Unification of Private Law, Organisation for Economic Co-operation and Development and, finally, the International Chamber of Commerce, (the last by one observer).

⁸ The United Kingdom has ratified the two Conventions of 1964 by "The Uniform Laws on International Sales Act, 1967". These two Conventions came into force in Britain as a whole in August 1972. The Convention relating to the Uniform Law on International Sale of Goods came into force in the U.K. on August 18, 1972 (Treaty Series 74[1972] Cmnd.5029), and that relating to the Uniform Law on the Formation of Contracts for the International Sale of Goods on August 23, 1972 (Treaty Series 75 [1972] Cmnd.5030).

ratified by Belgium, Israel, Italy, the Netherlands, San Marino and the United Kingdom; the ULFIS by the same States except Israel. The Federal Republic of Germany is expected to ratify both instruments in the near future. The fact that there were too few State participants in the Conference which adopted the texts of the Uniform Laws and that further improvements were required therein before they could be expected to receive the broad recognition that would be necessary to enable these Conventions to serve the purpose they were designed to achieve, the United Nations Commission on International Trade Law (UNCITRAL) made an effort to revise this system of the Law.⁹

II. SOME REMARKS: FORM, EVALUATION AND DIFFICULTIES IN DRAFTING

It was, no doubt, a difficult task for the draftsmen to design such a Draft for the Uniform Law on International Sales as to reconcile the divergencies which existed between the different legal systems and lay down rules which could be adopted by as many countries as possible. Indeed, even slight differences in the wording of similar rules may give rise to difficulties in reaching agreement in advance and settling disputes, as Prof. BERMAN has pointed out.¹ As an example of these difficulties there will be noted the different approach between the two law worlds, i.e. the civil law and the common law legal systems, as regards the settling of only one point: the remedies for breach of contract (this subject will be examined in detail later). In the civil law system the principal remedies are rescission and reduction of price,

⁹ See, D. SASSOON, C.I.F. and F.O.B. Contracts, BRITISH SHIPPING LAWS, vol.5, 2nd ed., p.318.

¹ H. BERMAN, *supra*, p.354, where he also observed that, even minor differences in the general contract law of different countries sometimes lead to substantially diverse results in similar cases.

whilst in the common law damages is the ordinary redress and the contract can only be avoided if the breach goes to the root of the contract. Damages are recognised in the civil law systems as a subsidiary remedy only, and such a remedy is operative only in the case where the party in breach is found guilty of fraud or gross negligence, whilst in English law, for example, the seller becomes liable for damages in any case unless reservations have been made before by him expressly in the contract. Nevertheless, the fact that the unification of the law of sale of goods had already been attempted and partly achieved as a workable legal system by several States before, as, for example, by Scandinavian countries and the Benelux States, and especially by the American Uniform Commercial Code of 1957, it was an important encouragement for the draftsmen.²

Another problem which had to be confronted with difficulties in the Conference was the fact that the system of the Uniform Laws had to be drafted by experts from countries which adhere to different national systems with different legal backgrounds and as such its language reflects the draftsmen's different legal techniques and expressions to which they were accustomed. This fact multiplied the disputes apparently in the Conference in their effort to find acceptable solutions from all countries' delegates in several cases. It was strongly criticised by some participants (to mention an example) because the Uniform Law on Sales was an extremely extensive enactment with its 101 Articles, more in volume than the Sale of Goods Act 1893, and the chapters on contract sale in the most modern Continental civil codes.³ But its different arrangement,

² See Prof. OTTO RIESE, "International Problems in the Law of Sale", in INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Suppl. Publ. No.9 (1964), p.35.

³ The Sale of Goods Act, 1893, for example, counts only 62 sections, while the Greek Civil Code, which is a strongly influenced enactment by the German Civil Code and the Swiss "Code des Obligations" of 1911, devotes 59 Articles dealing with the contract of sale which is the most alive contract in its property law, (Arts.513-579).

formulation in length and internal articulation, was justified by the Committee on the ground of its different character and function. Basically the system of the Law *"has been of European design but it moves towards meeting a need of world-wide dimensions"*, as Prof. HONNOLD observed.⁴ This character of the Law justifies the suggestion that is an enactment which *"is derived from two sources: one is international legislation and the other is self-regulatory standard contracts or trading rules"*.⁵

The Conventions allow States to ratify with certain reservations. A State may opt to apply the Uniform Law only to cases in which the parties to the contract have their places of business or, if there is no place of business, their habitual residences in different Contracting States.⁶ Any State, also, which has previously ratified one or more of the Hague Conflict Conventions applicable to the international sale of goods may declare at the ratification of the new Convention a reservation that the Uniform Law shall apply only in cases in which those previous Conventions require the application of the Uniform Law.⁷ Further, any State may ratify the Convention with the proviso that it shall apply only to contracts in which the parties have chosen the Uniform Law as the law of their

⁴ J. HONNOLD, "The Uniform Law for the International Sale of Goods: The Hague Convention of 1964", in *LAW AND CONTEMPORARY PROBLEMS*, vol.30 (1965), p.351.

⁵ See Prof. MICHIDA, "Possible Avenues to Preparation of Standard Contracts for International Trade on a Global Level", in *UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES OF GOODS*, ed. by J. HONNOLD, p.251.

⁶ SALE CONVENTION, Art.III. The main purpose of the two Conventions is to deal with sale contracts entered into by parties whose places of business belong to different Contracting States. Indeed, in the Contemplation of the Special Commission referred to, the meaning of the term "International Sale" in the title involves the following criterion: the fact that the place of business or, failing this the usual residence of the parties, is in different States and either a movement of the goods themselves across frontiers, or exchange of agreements across frontiers or, at least, a delivery of the goods in a country other than that in which the exchange of agreement took place. (See Report of the Commission of the 1956 Draft, in *RECORDS AND DOCUMENTS OF THE CONFERENCE*, vol.II, pp.20-21).

⁷ Ibid. Art.IV(1).

contract.⁸ Indeed, this principle, recognising the autonomy of the parties' agreement in respect of which may choose the applicable law in their contract, is one of the most important provisions in the whole system of the Law. In this sense the rules of the Uniform Law are conceived as a subsidiary law to be applied by national courts and arbitral tribunals in the light of particular contracts and the light of usage. On the other hand, Article 3 of ULIS permits the parties to exclude "*the application thereto of the present Law*" either entirely or in part, and "*such exclusion may be express or implied*". Thus, the Law

*"gives the parties full freedom by contract to override the provisions of ~~the~~ ULIS with respect to the various aspects of performance of the contract."*⁹

It is also possible for two or more Contracting States to declare that they agree not to consider themselves as different States within the meaning and under the purpose of the Uniform Law, because they have the same or close sales law,¹⁰ and thereby exclude the application of the Uniform Law among themselves. This provision will be of great importance for the Commonwealth countries.¹¹ The declaration may also be made unilaterally and in that case it will have effect unless rejected by the other State at the time of ratification.

⁸ SALE CONVENTION, Art. V(1). In its ratification of the Uniform Laws, the United Kingdom has adopted this approach. It will be mentioned that the British delegation was the sponsor of this rule which was adopted in the Conference after substantial initial opposition.

⁹ ULIS, Arts. 18, 19(1), 33, 38(4), 56, 69. See Prof. HONNOLD, *supra*, p.342, note 51. But cf. Prof. RABEL'S observations who pointed out: "*Within its corners, however, the text must be self-sufficient. Where a case is not expressly covered, the text is not to be supplemented by the national laws - which would at once destroy unity - but to be construed according to the principles consonant with its spirit.*" ("The Hague Conference on the Unification of Sales Law", in *I AMERICAN JOURNAL OF COMPARATIVE LAW*, (1952), p.60).

¹⁰ SALE CONVENTION, Art. II(1).

¹¹ Sponsors of this provision (exception) were the Scandinavian countries in the Conference, obviously because they have achieved the unification of their sales law.

The style of the Uniform Law on Sales, which will be the main subject of discussion in the present study is, in brief, the following: it is divided into six chapters of unequal length; some of these chapters are subdivided into sections. The rules themselves are set out in articles. There are not official headings of the articles, but in some of the sections several articles are grouped under one heading and some of the groups of articles so formed are for their part subdivided by sub-headings. Group-headings carry capital letters, indicating their number, while the sub-headings carry small letters for the same purpose (i.e. A, B, etc., and (a), (b) etc.). Group-headings and sub-headings greatly facilitate the understanding of the individual sections.¹² Its main chapters deal with Obligations of the Seller (Delivery of the Goods, Handing Over of Documents and Other Obligations); Obligations of the Buyer (Payment of the Price, Taking Delivery and Other Obligations); Provisions Common to the Obligations of the Seller and the Buyer; and Passing of the Risk. On the other hand, the Uniform Law on Formation deals only with offer and acceptance and makes no provisions for such matters as capacity, mistake and misrepresentation and other relevant problems. It has many similarities to the common law, e.g. provisions that a term of the offer stipulating that silence shall amount to acceptance is invalid; that a revocation of an offer shall have effect only if it has been communicated to the offeree before he has despatched his acceptance or has done any acts treated as acceptance under Article 6 (2) of the Formation Law.^{12a}

¹² See, R. GRAVESON, E. COHN, D. GRAVESON, "Uniform Laws on International Sales Act. 1967", p.4.

^{12a} ULFIS, Arts.2(2) and 5(4).

But it also contains several provisions departing from the common law as, for example, on revocation of an offer, or "acceptances", on lost or delayed acceptances, etc.¹³

Within the narrow ambit of the present study there is not included an examination of the subject of the Uniform Law on Formation of the Contracts for the International Sale of Goods. However, it is thought useful for the understanding of the operation of, and other questions referred to in, the Uniform Law on International Sale of Goods, to attempt some observations as to some problems relating to the other Uniform Law, especially in respect of the basic elements in the formation of a contract which are offer and acceptance. The rules laid down by the text to this effect are of general character which means that they may be applicable not only in sale contracts but almost in any type of contract. The ULFIS explicitly states that:

shall
*"The present Law apply regardless of the commercial or civil character of the parties or of the contracts to be concluded."*¹⁴

The idea of laying down general rules applicable to all kinds of contract is a part of the Continental European tradition which had reached its strongest manifestation in the German Civil Code of 1896 in which such rules were included in Book I.¹⁵ Sale as any other contract requires a meeting of consents, or, according to the definition given for contract: *"The typical modern contract is the bargain struck by the exchange of promises."*¹⁶ In the text of the Law the meaning of the sale contract is not defined and it will be developed by the courts and jurisprudence.

¹³ See, Arts. 5(2), 6, 7, 8, 9, 12 of ULFIS. See further, J. FELTHAM, "Uniform Laws on International Sales Act 1967" in MODERN LAW REVIEW, vol.30(1967), pp.675-76.

¹⁴ ULFIS, Art.1(8).

¹⁵ See, Prof. F. SCHMIDT, "The International Contract Law in the Context (cont.)

This approach is in line with most of the modern legislation. On the contrary, in the Sale of Goods Act, 1893, there is given the following definition:

*"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."*¹⁷

According to this definition two elements must exist in a sale contract: the article to be sold and the price to be paid; these two basic elements, which usually are found in every contract of property law, are connected by mutual agreement through the mechanism of the offer and the acceptance. The offer and the acceptance must coincide by means of the exchange of communications between the contracting parties. A contract cannot be formed without these substantial elements operative in a specific way. The Law explicitly states in respect to this effective way that:

*"An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer."*¹⁸

Therefore, any deviation from the fundamental principle required by the Law in this case that the offer and acceptance must be clear, produces an invalid form of the contract and is thus inoperative. This point is set out in a clear way by the Law, but the practical working out of the offer and acceptance may create some difficulties in their interpretation in the case where a response to an offer does not purport to complete a contract, or when the acceptance evidences an intention to form a

¹⁵ (cont.)

of Some of its Sources", in AMERICAN JOURNAL OF COMPARATIVE LAW, vol.14 (1965-66), p.1. Cf. the Greek Civil Code which devotes its fifth chapter laying down general rules of this character in order to be applicable to all kinds of contract, (Arts.127-200).

¹⁶ CHESHIRE & FIFOOT, The Law of Contract, 6th ed.(1964), pp.59-60.

¹⁷ Sale of Goods Act, 1893, s.1(1).

¹⁸ ULFIS Art.7(1).

contract but it contains some details which need elaboration, a kind of addition or deviation to complete the contract and the route of this procedure needs a certain period of time to elapse. The ULFIS, also, gives a simple rule relating to this question, that

*"a declaration of acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or . . . within a reasonable time."*¹⁹

According to this rule, which is not applicable in cases of oral offer where the acceptance must be immediate,²⁰ the means used for the communication of the acceptance has to reach the offeror within the time fixed for the acceptance. Further, if no time has been fixed by the offeror, it is provided by the same rule that the acceptance must be declared in "a reasonable time".^{20a} The latter is a generalized formulation which is used very often in the Law, as will be seen in the course of the discussion of this work. The sender carries the risk of transmission of the communicated means which must arrive to the other party within "a reasonable time". Nevertheless, the offeree can send another declaration or can declare his acceptance orally when the acceptance is communicated late provided that he can prove that his declaration had been sent to the offeror in due time and meanwhile (had not) the offeror sent a notice that he considers his offer as having lapsed because of the delay on the part of the acceptor. All the problems mentioned are explained in detail by the provisions of Article 9 of the ULFIS by the establishment of which the draftsmen attempted to give a last opportunity to the parties in a

¹⁹ ULFIS, Art.8(1).

²⁰ Ibid. Art.8(1), sub-para.2.

^{20a} Ibid. Art.8(1), sub-para.1.

sale contract to produce a sound contract so overriding some obstacles appearing during the procedure of formation of their contract. On the other hand, the offeror is bound by the despatch of the declaration of the acceptance as such - except in cases of revocable offers - irrespective of the delay in its arrival to the offeree when this is justified according to the circumstances. The definition of the technical terms "communicated" and "communications" is given, clearly enough, by the construction rule of Article 12 of the ULFIS, which is interpreted in combination with the provisions of Article 6. The Law adopted also, to this effect, the approach of the generalized formulation as to the means of communication according to the circumstances,²¹ as we have seen in the above discussion of offer and acceptance; it requires methods suitable to the specific contract, to the distance between the contracting parties, to the available means of communication, etc. when an ordinary letter is not enough.

Another divergent question in the formation of the contract under the Uniform Law, is the problem of revocation of offers despatched to the other party. Article 10 of ULFIS provides:

"An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance."

A "revocation" is a declaration coming from one party of a contract who intends to get rid of his obligation by the acceptance of an offer and this fact comes after the completion of the communication relating to the

²¹ See Arts. 8(1) and 9(2) of ULFIS.

acceptance. According to the beforementioned rule the revocation is only effective if it had been made before or at the same time as the acceptance. A similar expression is found in the text of Article 5 (1) of ULFIS referring to the revocation of the offer on the part of the offeror, where there is to be noticed a distinction between the terms "withdrawal" and "revocation". The practical working of the withdrawal in Article 5 (1) is effective in the same way as the revocation in Article 10, but there are some exceptions to the former rule contained in Article 5 (2), (3) and (4). The provision denying effect to an attempted revocation which "*. . . is not made in good faith or in conformity with fair dealing . . .*",²² causes discrepancies in interpretation, and was, hence, objected to in a way, by some delegates in the Conference. But, as has been said, the Uniform Law uses these generalized formulations quite often.

Finally, in the formation of an international sale contract there are two more important elements unascertained in the structure of the Law: the moment and place of the conclusion of the contract. This subject matter is taken to be of great importance, for many provisions in the substantive law on sales refer to the moment and the place of the conclusion of the contract. Indeed, throughout the text of the Law on Sales many references are made to the time of the conclusion of the contract²³ (which gives rise to many difficulties of determination, while the place of the conclusion of the contract is always connected with the former issue). However, the Committee was unable to reconcile

²² ULFIS, Art.5(2).

²³ See Arts. 1, 10, 22, 23, 36, 38, 46, 57, 73, 74, 82, 86, 99, of ULIS.

the divergent opinions in the discussion and find a reasonable solution to this problem, but the general attitude of the draftsmen as regards the Formation Law was that this is taken as an auxiliary to the Law on Sales, on the basis that the rules of the Formation Law will exclusively be applied to international sales of goods although the former are of general character, as has been seen. In the Draft of 1956 the time of the conclusion of the contract was defined by the first paragraph of its Article 12 as follows:

"If the acceptance consists of a declaration the contract shall be concluded by the fact of the acceptance being communicated to the offeror."

The establishment of this rule was justified by that Committee on the basis that

"the moment of the conclusion of the contract ought to be the time when the acts that constitute the contract bind the two parties irrevocably." ²⁴

Finally, after many disputes in the Conference this provision was removed from the text on the ground that the time of the conclusion of the contract is relevant in a great number of situations, which must be carefully examined by the competent courts; this approach is followed by most modern legal systems.²⁵

In conclusion, a few words in respect of the formulation of the Uniform Law on Sales which, as has been said already, will constitute

²⁴ See Prof. F. SCHMIDT, *supra*, pp.28 et seq.

²⁵ Cf. the rule of s.2-204-2 of the American Uniform Commercial Code which provides: *"An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."*

the main subject of the present work: the main body of this act deals with rules concerning obligations of the seller and the buyer, breach, damages, other remedies, the passing of the risk and a variety of similar matters. In many of these provisions the ULIS uses some of the familiar to the common law concepts as, for example, those governing the concurrence between delivery of the goods and payment of the price,²⁶ and those relating to the exemptions²⁷ (frustration), but in other cases it takes a different approach, as in the case of the passing of the risk in which the basic rule of the Law is that the risk is to pass to the buyer upon delivery of the goods.²⁸ Remedies, which is one of the main subjects of the ULIS, are specifically set down for the breach of certain obligations as, for example, those provisions dealing with remedies for default as to date of delivery of the goods,²⁹ or those dealing specifically with remedies for defaults as to place.³⁰ Various types of breach on the part of the buyer are also specifically treated, as, non-payment,³¹ failure to take delivery,³² miscellaneous unclassified breaches,³³ etc. But the general scheme for treatment of this problem is that in the case of a fundamental breach, the innocent party may either declare the contract avoided and claim damages or, simply, claim damages; in other cases he is limited to claim damages only.³⁴ Generally speaking, it can be said that the Uniform Law on Sales, though being in a great deal influenced in its drafting by both the common law and civil law

²⁶ ULIS Arts.71-72.

²⁷ Ibid. Art.74 (see, *infra*, p.150 *et seq.*).

²⁸ Ibid. Art.97.

²⁹ Ibid. Arts.26-29.

³⁰ Ibid. Arts.30-32.

³¹ Ibid. Arts.61-64.

³² Ibid. Arts.66-68.

³³ Ibid. Art.70.

³⁴ Ibid. Arts.55, 70.

legal worlds, completely differs from them and has its own individual form and its subjects are presented in a clear and logical way, especially the part of ULIS which is concerned with the obligations of the seller and the buyer, as appropriately has been suggested,³⁵

"could be adopted by most of the major trading nations of the world without too much difficulty and, indeed, without substantially changing their existing law."

III. PROBLEMS IN THE INTERPRETATION OF THE LAW BY MUNICIPAL COURTS

It has been emphasised that the Uniform Law on Sales drafted to serve the purpose of a world-wide uniformity in its subject, refers exclusively to the legal relations of the contracting parties, and more specifically to their mutual obligations derived from an international contract sale. However, in establishing such a contract the intervention of a great number of other questions will be inevitable, as, for example, problems dealing with the rights of third parties outside the contract, questions relating to the formation and validity of the contract and the capacity of the contracting parties and so on. Indeed, the Uniform Law has left out of its scope the examination of many of these crucial questions the solution of which will be, inevitably, investigated by a careful interpretation in a particular contract by municipal courts. At the time of the making of this act it was thought that it was beyond its competence to include provisions, for example, affecting the relationship between the buyer, in an international sale contract, and the consumer buyers, in the sense that the Law is addressed

³⁵ J. FELTHAM, *supra*, p.673.

only to the parties - citizens of different States who are treated as being an exporter and an importer; and that it is impossible for the Law to resolve all the conflicts arising between all the principles of the various legal systems since it is not unusual even in the case of national statutes for a considerable number of points to be left to judicial interpretation; and, as has been appropriately remarked:

*"like any other law the Uniform Law does not deal with those innumerable points of detail which must of necessity be left to interpretation by courts and commentators."*¹

Therefore, the interpretation of an international sale contract by the competent national courts or tribunal or arbiter, in order to fill the gaps left open by the Law, will be of a great importance for the practical working of this new statute. But a second question connected with this problem is: which would be the appropriate method to be followed to this effect? It is undoubted that the domestic courts will prefer to apply their own respective traditional methods which have a specific value of their own and are familiar to them. This fact has often been confirmed in the past from the practice in the application of other uniform statutes. The national courts in particular are reluctant to face conflicts with the state legislation in the application and construction of uniform statutes. In such cases they showed an inclination to interpret in conformity with their domestic constitutional laws or with their well-established domestic laws. Obviously, such a policy of domestic courts, in regard to the problem under examination, leads to the undesirable result of the failure of unification which is the essential purpose of these statutes. Hence, inevitably, the relationship between the Uniform Law and national rules becomes somewhat controversial.

¹ R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.27.

When a State accepts a uniform statute as a part of its own legislation, the State legislature in so doing substitutes the provisions of that statute for the corresponding national rules. The Uniform Law itself does not seem to give an explicit answer to this crucial question. Article 17 which refers generally to relevant matters provides that:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

The meaning of this Article appears to be ambiguous. Basically it is confined to problems which relate to the relationship between the seller and the buyer since it refers to the ". . . conformity with the general principles on which the present Law is based." It is also suggested that "general principles" within the meaning of this Article are not merely those provisions contained in Article 9 *et seq.* of ULIS (which refer to usages, practices, expressions, provisions or forms established between the contracting parties themselves in order to be applicable to their contract, etc.), but those general principles of the Law which are either expressly contained therein or which may form those principles of which the detailed provisions of the Law constitute the specific application to the individual facts.² Prof. TUNC,³ however, suggested that the aforementioned rule of Article 17 applies to interpretation as well. He added that the Law is very detailed so that omissions will only rarely be found and its length will render it as a rule easy to extract the general principles and that a consultation of the *travaux*

² See, R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.62.

³ A. TUNC, "A Commentary" to the Draft in RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.I, p.367.

préparatoires will facilitate this task. On the other hand, it is generally agreed among the Continental writers that the use of the doctrine of *travaux préparatoires* in the interpretation of a treaty, generally, is only one of the ways of establishing the true meaning of any legal rule and that it has to be supplemented by a due appreciation of the context and functioning of the provision under consideration.

There is a similarity between the above approach to this problem and that suggested by F. MANN,⁴ which refers to the British courts' policy, in particular. He pointed out that:

"For the purpose of ascertaining the intention of the Legislature the meaning of statutes is primarily to be sought in themselves. The words of the statute must generally be interpreted in their ordinary grammatical sense, and if they are ambiguous, the Legislature's intention must be sought first in the statute itself, then in other legislation and contemporaneous circumstances, and finally in the four rules laid down in Heydon's Case,⁵ which enjoin the judge to have regard to the common law in force before the Act, to the mischief not provided for by the common law, the remedy appointed by Parliament and its true reason."

However, the courts in Britain used a wider approach in trying to interpret national statutes, in relevant cases, in line with the international law. This approach can be shown in the statement of Lord DENNING, M.R., in Salomon v. Commissioners of Customs and Excise,⁶ when the Court of Appeal had overruled a decision after coming to a conclusion on the basis of "The Customs and Excise Act, 1952". He pointed out:

⁴ "The Interpretation of Uniform Statutes", in LAW QUARTERLY REVIEW, vol.62 (1946), p.278.

⁵ (1584) 3 Co.Rep. 7a.

⁶ [1966] 3 All E.R.871, 874.

"I am confirmed in this view by looking at the international Convention which preceded the Act of 1952 . . . I think that we are entitled to look at it, because it is an instrument which is binding in international law; and we ought always to interpret our statutes so as to be in conformity with international law. Our statute does not in terms incorporate the Convention, nor refer to it, but that does not matter. We can look at it."

Further, there have been formulated some other theories regarding the problem under examination, by courts of various countries. Most of the courts in the United States of America, for instance, have adopted the principle of the "*liberal or extensive construction*", on the basis of the rule which had been developed by the Supreme Court of the United States. The "*purpose of the treaty, the intentions of the parties and the principle of good faith have sometimes been adduced as necessitating this rule*", as has been suggested.⁷ This approach has been strongly followed by the courts of the United States and in one case⁸ the following statement was expressed:

"Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose."

Lord ATKIN'S attitude, in R. v. International Trustee,⁹ is in line with the above theory. According to the former attitude the legal principles which are to guide a court on the question of the proper law in a contract, are those which the parties intended to apply, and

⁷ See, C.H. SCHREUER, "The Interpretation of Treaties by Domestic Courts", in THE BRITISH YEAR BOOK ON INTERNATIONAL LAW, vol.45 (1971), p.286.

⁸ Wright v. Henkel, 190 U.S. 40, 57.

⁹ [1937] A.C.500, 529.

"Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances."

Contrary to this theory lies the principle of the restrictive interpretation of treaties, which is in favour of the freedom of States, mainly championed in the courts of Germany.

On the other hand, the method of proceedings used by a certain State for the incorporation of an international statute is related to this problem to a great extent. It has been observed that the countries use their own techniques in incorporating an international convention in their national laws and this fact creates serious obstacles to the achievement of uniformity. There have been noted three ways in which municipal courts have interpreted treaties in relation to their own domestic legislations:

- (i) they have construed treaty provisions so as to avoid conflict with existing municipal, especially constitutional, law;
- (ii) they have interpreted terms used in treaties in the sense they have in the domestic system; and
- (iii) they have applied to international agreements municipal law rules of construction intended to apply to contracts, statutes or other documents.¹⁰

In all these cases the treaty becomes applicable only after its "transformation" by virtue of a domestic rule of incorporation.

¹⁰ See S.H. SCHREUER, *supra*, pp.265 *et seq.*, where he cites several illustrative examples related to these approaches.

Prof. SUNDBERG, on the contrary, has strongly supported the so-called "*monistic theory*" as the only unfailing method for the interpretation of international treaties, which is apparently in favour of the treaty itself. He observed:

*"Every method which introduces material extraneous to the convention itself here represents a potent threat to uniform interpretation. Consequently, it is but natural to regard the monistic theory of international obligations as the one best suited to secure a uniform interpretation . . . In so far as it avoids reliance on domestic legislation, which always means some sort of reference to the prevailing domestic legal system, it can be said in principle to shut the door on a domestic conceptualism extraneous to the treaty itself."*¹¹

In the case of the Uniform Law it is submitted that pre-existing national rules will be replaced only as far as they have the same range of application as the rules of the Uniform Law, while municipal rules with different subject matter will not be affected. The Uniform Law itself contains several provisions which make special references to municipal laws (*lex fori*) or usages, and these cases constitute an obvious deviation from the general principle of Article 2 of the ULIS (and its counterpart provision of the ULFIS, Article 1, paragraph 9), which aimed at excluding the application of private international law. In certain Articles of ULIS, as well as of ULFIS, it is provided that usages shall apply to particular questions, while in one particular provision there is expressed an apparently favourable attitude of the Law towards usages since it provides that when there is a conflict between the rules of the Law and usages, the latter shall prevail, unless otherwise agreed by the parties;¹² but usually

¹¹ J. SUNDBERG, "A Uniform Interpretation of Uniform Law", in SCANDINAVIAN STUDIES IN LAW, vol.10 (1966), p.224.

¹² ULIS Art.9(2).

usages are taken as of the same level as the provisions of the Law. In several cases, also, the Law contains references to the national laws for the solution of certain problems as, for example, for the applicable method of examination of the goods handed over, provided in Article 38 (4) of the ULIS; for the definition of a date or a period for the delivery of the goods whenever this matter is undefined in the contract, provided in Article 21; for the determination of damages caused in case of fraud, provided in Article 89; and other cases. Of special importance seems to be the provision included in Article VII of the Sale Convention dealing with the remedy of specific performance. It has been left to the discretion of the court in the State in which the action is brought to decide whether, in fact, such remedy will be granted, as we shall see later in this thesis.

Finally it is worth mentioning the view expressed by the International Law Commission in the commentary in its final Draft Articles on the Law of Treaties, in respect of the method to be preferred in the interpretation of international conventions, in general. This view was adopted later in Vienna and it seems to correspond to the general tendency of the modern law; it reads:

*" . . . In so far as the maxim ut res magis valeat quam pereat reflects a true general rule of interpretation, it is embodied in Article 27, paragraph 1,¹³ which requires that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose."*¹⁴

¹³ In the final version adopted in Vienna this Article was cited Article 31, para.1.

¹⁴ AMERICAN JOURNAL OF INTERNATIONAL LAW (OFFICIAL DOCUMENTS), vol.61, (1967), p.351. See, CORBIN, On Contracts, p.489 (one-vol.ed.), where he gives the meaning of the above Latin maxim of Julianus as follows: "Translated freely, this is a rule that a writing should be given a meaning that will make it legally operative rather than one that will not."

GENERAL OBSERVATIONS TO THE SELLER'S OBLIGATIONS

As we have seen in the Introduction the scope of the Uniform Law, as defined in Article 8 of the Uniform Law on Sales, relates only to the basic obligations of the seller and the buyer.¹ Generally speaking the substantive law on international sales, (i.e. the Uniform Law on Sales), apart from its general principle which establishes the rules of the Law^{as} non-mandatory rules providing that the Law shall apply only if the parties have chosen it as the proper law of the contract,² is divided into four major parts, namely, the obligations of the seller, the obligations of the buyer, provisions referring to the common obligations of the seller and the buyer, and the passing of the risk. A result of the restricted scope of the Law is that in a certain contract of sale in order that the gaps left open by the present Law be filled the counterpart rules of the national laws will be applied in any case, that is to say, the private international law; this is contrary to the provision of Article 2 of the Law which reads:

"Rules of private international law shall be excluded for the purposes of the application of the present Law."

The term "obligation" in contract law, generally speaking, is always divided into two basic branches, i.e. an obligation in a contract lies either to the seller's side or to the buyer's one. Chapter III of ULIS, (after the General Provisions, in chapter II), deals with the "Obligations of the Seller". The first Article of this part of the text is related to the delivery of the goods which must be ". . . as required by the contract and the present Law".³ There is a difference

¹ ULIS Art. 8.

² Ibid. Art. 4.

³ Ibid. Art. 18.

between the formulation of Article 18 and the following Article 19 (1), which provides that *"delivery consists in the handing over of goods which conform* (the corresponding expression of Article 18 is as required), *with the contract"* (the corresponding phrase of Article 18 seems to be wider since it adds: and the present Law). This difference is justifiable by the different purposes in the operation of the two rules. Article 18 working as a heading of the above mentioned chapter III of the Law, constitutes a summary of the following group of Articles, whereas the functioning of Article 19 (1) is related exclusively to the delivery of the goods and contains a rule of construction as to the term "delivery". Further, Article 19 (paras. 2 and 3) is going on to the details of the term "delivery", stating how delivery is accomplished in a case of a contract of sale which involves *"carriage of the goods and no other place for delivery has been agreed upon"*, and in this case, in addition to *"handing over the goods to the carrier for transmission to the buyer"* the seller is obliged to send to the buyer notice of the consignment, and if necessary, some documents specifying the goods.

Therefore, Article 19 *et seq.* generally relate to the obligations of the seller as regards the delivery of the goods. On the other hand, it is worth mentioning that Article 18 lays down an additional element relating to the meaning of the term "delivery", stating: *"... and transfer the property in the goods"*. There is no corresponding expression in Article 19 (1) which, as we have seen, is a rule of construction of the term "delivery". The fact that the Law deals only with the parties' obligations and is not concerned with the other details of the contract, as, e.g. the property in the goods sold, etc.⁴ leads to the conclusion that Article 18 using the foresaid

⁴ ULIS Art. 8.

expression, refers to negotiations between the parties, or the usages, expressions, provisions, or forms used in commercial practice, in the meaning of Article 9. Therefore, it is undoubted that in these subjects the national laws will be employed so that the gaps left open by the Law will be covered, and the transfer must conform to the rules to which a national legal system is applicable. Comparing these rules of the Law with those corresponding to other law systems, which belong to both the common law and the civil law families, we can easily realize that in the case of the Law the draftsmen left the problem of the property open.⁵ Under the Sale of Goods, Act, 1893, for example:

"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale," (s.27).

Moreover, ss. 21 to 26 of the same Act provide, in general, that the seller cannot pass a better title than he himself has.

In the further development of the present subject of the seller's obligations the Law is concerned, in sub-section 2 of chapter III, with the basic obligations of the seller as regards the conformity

⁵ Under the Civil Code of RSFSR. (1964), Art.135, *"property in goods passes to the buyer of the goods at the moment the goods are transferred to him, unless otherwise stipulated by law or specified in the contract"*. (See further, A. RUBANOV and V. TSCHIKVADSE, "Some Aspects of the Unification of the Law of Sales", in UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES OF GOODS, edited by J. Honnold, pp.359 *et seq.*). Under the Greek Civil Code of 1940, which came into effect in February, 1946, the relevant rule is that of Art.513, which defines the main obligations of the parties in a contract of sales, in a rather brief way including two basic obligations of the seller; (a) Handing over of the goods, and (b) Transfer the property of them. Breach in one of these two obligations, therefore, constitutes only partial performance of the seller's obligations. It will be recalled that the Hague Convention on the Law Governing Transfer of Property in Relation to the Contract of Sale was signed by only one country, Greece. Finally in the text of the Draft under review it was decided to evade the question of property, because of its complexity. (See B.A. WORTLEY, "A Uniform Law of International Sales of Goods", I.C.L.Q., 7(1958), p.3.)

of the goods. The following pages will be devoted to the examination of this subject. This part of the Law contains seventeen articles (33-49), and is divided in three groups of articles. Each of them is connected with a group-heading. The first part of the present study will be devoted to the examination of the group of the first five Articles which, as their title indicates, refer to the theme: "Lack of Conformity", (Articles 33-37).

CHAPTER ONE

LACK OF CONFORMITY

CHAPTER ONE

L A C K O F C O N F O R M I T Y

GENERAL OBSERVATIONS

It has already been realised that one of the most important requisites to be imposed in the seller's obligations is the conformity of the goods sold, as it is required by the contract, the present Law, and some other factors according to the circumstances. It is obvious that a presupposition in the investigation of the conformity is that the goods must have been delivered to the buyer or, to the carrier for transmission to the buyer, in the case when the sale involves carriage of the goods, (because the carrier in such a case acts on behalf of the buyer and not on his own).

The text devotes five Articles to the examination of the present subject. Article 33, the first of this group, lays down a series of clauses which analyse the defects as to the conformity of the goods. This Article, which is an elaboration of Article 19 (1) providing that the goods must conform to the contract, constitutes an important framework to the matter in question. It deals with the quantity of the goods, their character, their quality, adopting in this case an objective criterion as well as a subjective one, so giving a helpful instrument to the hand of the judge who will cope with the difficulties of the interpretation of an international sale contract. Finally the Law uses a general rule, that the goods must "*possess the qualities and characteristics expressly or impliedly contemplated by the contract*".¹ This expression is, in Prof. HONNOLD'S opinion, the

¹ ULIS Art.33(1) (f).

most attractive feature of this part of the Law which expresses in a rather simple but powerful manner this general principle:

"This language seems just right to direct attention toward the crucial issue - the construction of the contract - and to help tribunals move beyond the incomplete articulation of complex expectations to the rich overtones of the transaction in its commercial setting." ²

In fact the foregoing principle of the text corresponds to the relevant concept of the customary "warranty" law of the common law system and its counterpart "guaranty liability" of the civil law.

The second paragraph of Article 33 comprises a restriction in the application of the above principle. It states that any defect as to conformity of the goods to be considered as such must be "material". This means that the Law accepts a minimum of deviation on the part of the seller's obligations as to conformity. This is a principle which is known in most of the modern legal systems, especially to those belonging to the civil law family, whereas this principle is not articulated in the Anglo-American laws but it has been adopted in the practice of justice, as it will be realised in the following pages, although the opposite attitude adopted by the courts is not unusual.³ Indeed, such a provision seems to be reasonable and fair, for the defect of a trivial quantity, for example, in a large shipment in which the buyer has paid for the whole quantity, would not seem to be considered sufficiently serious to entitle the buyer to reject the consignment of the whole bulk of the goods.⁴

² J. HONNOLD, "The Uniform Law for the International Sale of Goods: The Hague Convention of 1964", in LAW AND CONTEMPORARY PROBLEMS, vol.30 (1965) p.336-7.

³ See, Arcos, Ltd. v. E.A. Ronaasen & Son, [1933] A.C.470.

⁴ See, the different opinion of Prof. J. HONNOLD, in the above cited article, p.337.

In what follows we are going to examine further the problems just-mentioned which pertain to the character of the goods in a contract sale.

DEFECTS AS TO QUANTITY

Delivery only of a part of the goods agreed upon to the buyer does not constitute a sufficient performance of the contract obligations on the seller's part. The quantity of the goods delivered must be "*as required by the contract and the present Law*", according to the provision of Article 18. It is a breach of the contract entitling the buyer to reject the goods handed over, if the quantity delivered is either larger or smaller than that agreed upon by the parties,¹ which means that the goods must correspond to the contractual terms. Thus, the tender of a smaller or a larger quantity than the quantity contracted, or the delivery of the goods contracted for together with other goods, constitutes a breach of the above mentioned rule of the Law. Logically, the foregoing principle seems to be extracted from the rule of Article 19, which provides that the goods must conform with the contract. There is no doubt that this provision is an elaboration of Article 19 (1).

However, defects as to quantity of the goods shall not be taken into consideration unless they are "material".² Thus, the Law adopting the *de minimis* principle³ justifies a slight deviation as regards the matter in question, i.e. the quantity of the goods.

¹ ULIS Art.33(1) (a).

² Ibid. Art.33(2).

³ Most of the law systems have adopted this approach but in the case of the Sale of Goods Act, 1893, s.30 imposes a strict obligation and is really an exemplification of s.13 which requires goods delivered to correspond with their description, (see G.J. BORRIE, *Commercial Law*, 3rd ed. p.99).

Arguments about the quantity will arise whenever an approximate amount has been tendered and what, actually, constitutes a wrong quantity, or, in other words, what is the limit of the permissible quantity not to be delivered to the buyer, is a question left to the judge's discretion to adapt the rule according to the circumstances of the individual case. This treatment seems to be practicable in business life, because the opposite approach creates an unreasonable obstacle in trade if, for instance, the buyer is entitled to reject the contract for any defect in the goods delivered to him.⁴ On the other hand, it is possible for the parties to agree that the quantity would be "more or less" than a certain one. In such a case there is an element of vagueness as to the quantity of the goods to be delivered and the seller, of course, is justified in delivering more or less than the amount negotiated by the parties. But there is always an ambit of the term "more or less", and the seller has no right to move outside its boundaries. In Harland and Wolff, Ltd. v. Burstall & Co.,⁵ the contract was for 500 loads of timber, and it was held that delivery of 470 loads would have been a non-performance of the contract which would have entitled the buyer to reject them. On the other hand, in Re Moore & Co. v. Landauer & Co.,⁶ the buyer agreed to purchase 3000 tins of Australian canned fruit, packed in a special way, i.e. in cases of 30 tins. The total quantity ordered was delivered and was of the expected quality, but it was found that half of the cases contained only 24 tins. The Court accepted that the buyer was entitled to reject the whole

⁴ Cf. the relevant rule of the Greek Civil Code for the definition of a "defective fulfilment" of the seller's obligations. It provides that "*the defects must be so substantial that the buyer would not be interested in such a fulfilment*" (Art.382).

⁵ (1901), 84 L.T.324.

⁶ (cont.)

consignment. But in Shipton, Anderson & Co. v. Weil Bros & Co.,⁷ where the quantity of wheat specified was 10 per cent more or less than 4,500 tons, it was held that the tender of 55 lb. more than the maximum quantity of 4,950 tons, allowable under such a term, was nevertheless a "substantial performance" of the contract by the sellers. In the latter case, LUSH, J., justifying this decision, stated:⁸

"The right to reject is founded upon the hypothesis that the seller was not ready and willing to perform, or had not performed, his part of the contract. The tender of a wrong quantity evidences an unreadiness and unwillingness, but that must mean an excess or deficiency in quantity which is capable of influencing the mind of the buyer".

And he went on to explain why an excess in quantity entitles the buyer to reject:

"The reason why an excess in tender entitles a buyer to reject is that the seller seeks to impose a burden on the buyer which he is not entitled to impose. That burden is the payment of money not agreed to be paid. It is prima facie no burden on the buyer to have 55 lbs. more than 4,950 tons offered to him . . . [but if] the sellers had expressly or impliedly insisted upon payment of the 4s . . . the case would have been different".

There is not any dispute that the Court decided correctly in this case, because the quantity in excess was so trifling that such a difference can possibly appear when the quantity shipped is converted from kilos into tons, as pointed out in the learned judge's important observations. But, let us suppose that in the case of a larger quantity the seller does not demand an additional payment for it from

⁶ [1921] 2 K.B. 519; [1921] All. E.R. Rep. 466.

⁷ [1912], 1 K.B. 574.

⁸ (cont.) ? Page ?

the buyer. In this case, is the buyer entitled to reject the tender and will this fact seem unreasonable from the buyer's viewpoint?

Prof. GREIG gives the following answer to this problem:⁹

"If no demand for additional payment is made, it is still possible for the delivery of an excess quantity of the correct goods to impose a burden on the buyer. If he has bought to resell, the additional quantity can give rise to disputes with the sub-buyer. It would cause inconvenience to have to deduct the excess quantity before resale. The excess might not be easily disposed of either by sale or as waste".

Obviously, this opinion conforms to the above discussed decision.¹⁰ The Law, by stating that a breach of contract regarding the quantity of the goods (as well as their quality) must be "material" in order to be taken into consideration, apparently leaves open the crucial question of the correct criterion to find out when a deviation of the quantity (or quality) in a contract is considered as "material" or not. This question seems to create practical difficulties. In Prof. HONNOLD'S remarks:

"The scope of . . . the provision of Article 33 is controlled by the fact that this is a rule on whether the seller has "fulfilled" his obligation to deliver conforming goods. Hence, any deviation as to quality or quantity could hardly be dismissed as "not material" if it would call for compensation in damages. Thus, defects in a very few items in a large shipment could be "material" if the buyer has paid for the larger quantity, or if the seller demands full payment for the defective goods. On the other hand, if the market has not risen, such a deviation may not be "material" if the seller bills only for the quantity of conforming goods".¹¹

⁸ [1912], 1 K.B. 574, pp.577-578.

⁹ D.W. GREIG, "Sale of Goods", (1974), pp.127-128.

¹⁰ Shipton, Anderson & Co. v. Weil Brothers & Co., [1912] 1 K.B. 574.

¹¹ (cont.)

It is obviously realized that the "*de minimis*" principle to be applied is not an easy task for the courts to cope with. Indeed, this seems to be a controversial problem and courts have, on each occasion, to take into consideration the surrounding factors, that is to say, the usages, expressions, provisions, or forms used in commercial practice.¹² Taking illustrations from the English judicial practice we can say that the courts have declined to apply the "*de minimis*" rule in cases where conditions are not included in a contract allowing a degree of flexibility in the amount to be delivered expressly by the parties. In such cases they are rather reluctant to apply this rule. Comparing the provisions of the Law with those of the Sale of Goods Act one can say that they are consistent with ideas on which the latter system of law is based.¹³ In Rapalli v. K.L. Take Ltd.,¹⁴ the contract was for 15 tons of medium sized Parma onions. At a conservative estimate, six or seven per cent were smaller than the 50/70 cm. range regarded as "medium" in size for onions. There was some evidence that, on the Continent, tolerance of up to 10 per cent was allowable on such goods. Such a variation was clearly not part of this particular contract, but it was adduced before the court in order to establish a reasonable allowance in terms of the "*de minimis*" principle within the trade. This argument was rejected by the Court of Appeal.

¹¹ J. HONNOLD, *supra*, p.337.

¹² ULIS Art.9.

¹³ Sale of Goods Act 1893, s.30: "*Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.*"

¹⁴ [1958] 2 Lloyd's Rep. 469, C. A.

Where a special condition is contained within the body of the contract allowing a variation¹⁵ in the amount of the quantity this condition must be apparent. This means that the parties can contract beforehand as to what is to happen if the quantity of the goods to be delivered is not the specified one, or can agree after the event by taking a fresh agreement on the basis of the incorrect or inaccurate delivery.¹⁶ On the contrary, in the absence of any such prior or subsequent agreement the seller is obliged to prove at least the existence of a usage of trade, otherwise he will be bound by the statement of the amount contained in the contract. But it must be recalled that the difference in quantity must be substantial. In carrying out a commercial contract some slight elasticity is inevitable, as BIGHAM, J., pointed out in Harland & Wolff, Ltd. v. J. Burstall & Co.,¹⁷ where the seller had answered the buyer's enquiry with a statement that he (the seller) had "about" 500 loads of the wood specified available for shipment, and followed this up by informing the buyer that he had an offer of cargo space for 500 loads. The telegram of acceptance and the subsequent contract note were in unqualified terms for 500 loads. The seller discovered that he only had 470 loads which he nevertheless dispatched. As we have seen above^{17a}, the buyer rejected the goods and his action was held to be justified. The attempt was made to argue (i) that in the trade the seller was entitled to send "about" the quantity named; (ii) that "about" meant "within 10 per cent" and (iii) that, in any case, "about 500 loads" was what was intended by the parties from their negotiations. This contention was rejected by

¹⁵ See Shipton Anderson & Co. v. Weil Bros & Co. [1912] 1 K.B. 574.

¹⁶ See Gabriel Wade & English v. Arcos Ltd. (1929) 34 Ll. L. R. 306.

¹⁷ (1901) 84 L.T. 324; cf. Lomas & Co. v. Barff Ltd. (1901) 17 T. L. R. 437.

^{17a} See above p.33.

BIGHAM, J.; in his view no such custom existed, nor could the use of the word "about" in the negotiations be allowed to qualify the interpretation of the document in which the contract was finally expressed.¹⁸

It has been said that the phrase "more or less" or other equivalent words such as "approximately" or "about" in mercantile contracts is well understood to cover only a small variation to both sides. The strict duty of performance is qualified by the "*de minimis*" principle which gives a degree of flexibility to the need to compromise the rights and obligations of buyer and seller in this type of situation, by taking into account the nature and the subject matter of the contract, the knowledge of the parties at the time they entered into it, and the relations between them. But there was not such a small variation in Payne and Routh v. Lillico & Sons,¹⁹ where ROWLATT, J., pointed out:

*"If it is a matter of ounces or pounds you may disregard it. But this is a matter of tons, and it is a serious amount . . . and I do not think that I can regard it as coming within the clause [allowing a variation]."*²⁰

Where the agreement between the parties is a "requirements" contract, i.e. an agreement to supply such a quantity as the purchaser may require, including an equivalent condition such as "more or less" etc., the first thing to be decided is whether there is an enforceable contract at all, or if such an agreement is to constitute only a sort of standing offer to supply such quantity of goods, as the buyer may from time to time choose to order, without imposing any obligation on him to order any at all.²¹ But if the buyer undertakes to purchase

¹⁸ See D.W. GREIG, *supra* pp.128-129.

¹⁹ (1920) 3 Lloyd's L.Rep. 110.

²⁰ Ibid. p.111, (see D.W. GREIG, *supra* p.129).

²¹ See A. G. v. Stewards Co. Ltd., (1901) 18 T. L. R. 131.

all the goods required from the seller and from no other source, there is a contract, and the buyer is bound by his promise. In Steel Company of Scotland v. Tancred Arrol & Company,²² a steel company made an offer for supplying the whole quantity of the steel required by the buyer for the construction of the Forth Bridge. The estimated quantity of the steel was an understanding by the parties to be 30,000 tons, more or less. In an action brought by the steel company against the buyer for declarator that the defenders were bound to take from the pursuers the whole steel required in the construction of the bridge, and for damages in respect of the defenders having supplied themselves from elsewhere with steel required for the bridge, it was held that the defenders were bound to take from the pursuers the whole steel required for the bridge, the mention of 30,000 tons being merely by way of estimate of the quantity to be required.

Another problem which can appear in the application of the Law when the goods delivered are not what the buyer ordered in quantity, is the controversial problem in the case of delivery by instalments. It is undoubtedly accepted, of course, that if the parties have expressly contracted so, delivery by instalments is a contractual obligation and, therefore, it must be executed in this way. On the other hand, there are some special kind of goods which by nature need to be supplied by instalments, as, for instance, when an international agreement is made between two countries or two companies established in different countries, to supply one of them with ~~electricity~~ ^{gas} continuously. In such a contract the delivery of the goods would be by instalments by all means. But

²² 16 R. 440 (1890); 17 R. (H. L.) 31. See also: J. Kier & Co. Ltd. v. Whitehead Iron and Steel Co. Ltd. [1938] 1 All E. R. 591; Berk & Co. Ltd. v. International Explosives Co. (1901) 7 Com. Cas. 20.

difficulties arise in a normal case. Is the seller entitled to deliver the goods in a normal contract by instalments? There is no answer to this question by the text except the wording of sub-paragraph (a) of Article 33 providing that:

" . . . part only of the goods sold or . . . a smaller quantity of the goods than he (seller) contracted to sell."

This expression constitutes, possibly, an exclusion of the instalment delivery. On the contrary, the Sale of Goods Act explicitly provides that to be a sale by instalments it is necessary to exist an agreement thereof by the parties; the relevant rule is read:

*"Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments."*²³

In Behrend & Co. Ltd. v. Produce Brokers Co. Ltd.²⁴, the buyer had agreed to buy 200 tons and 500 tons of two different types of cotton seed from the seller to be shipped in one or more vessels from Alexandria and delivered in London. Part of the goods (176 and 400 tons, respectively), was sent on a particular vessel. In London the vessel unloaded only 15 and 22 tons of the seed before proceeding to Hull to unload further cargo with the promise that the rest of the cotton seed would be delivered a fortnight later after the vessel had been to Hull. The question to be decided was whether the buyer was entitled to refuse to take delivery of the rest of the consignment (i.e. the 154 and 385 tons). It was held that the buyer was entitled to a complete delivery of the goods covered by the bill of lading and that once delivery had commenced, the buyer was entitled to delivery of the entire shipment.²⁵

²³ Sale of Goods Act 1893, s.31 (1).

²⁴ [1920] 3 K.B. 530; [1920] All E. R. Rep. 125.

²⁵ Sale of Goods Act 1893, s.31 (1).

There are some cases, of course, where instalment delivery of the goods is inevitable by the very nature of the goods themselves as, for instance, in the case of an agreement when a subscriber undertakes to buy magazines, etc. regularly. In this case the delivery of the goods sold should take place periodically, in accordance with the undertaking of the seller, or the manufacturer. Another category of instalment delivery cases are those similar to Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.²⁶ in which the Judicial Committee stated:

"In many cases of contract to supply a quantity of goods to be delivered within a fixed period, the whole quantity cannot, from the very nature of the case, be delivered at one time."

In the absence of any provision in a contract providing for equal periodic quantities it is accepted²⁷ that the arrangement of the amount which is to be despatched in every one, or group, of instalments,²⁸ depends on the discretion of the party who has the control of the operation, i.e. the seller.

THE QUALITY OF THE GOODS

Article 33 of the Law deals with the quality of the goods in paragraph 1, sub-paras. (b), (c), (d), (e) and (f), whereas to the subject of the quantity it devotes only one rule, which is contained in the sub-paragraph (a) of this Article. Such difference in the treatment of these two matters by the Law seems to be reasonable, because

²⁶ (1886) 12 App. Cas. 128, 138.

²⁷ See further D.W. GREIG, *supra*, p.132.

²⁸ Calaminus v. Dowlais Iron Co. Ltd. (1878) 47 L. J. Q. B. 575; Behrend & Co. v. Produce Brokers Co. (1920) 25 Comm. Cas. 286; [1920] 3 K. B. 530; [1920] All E. R. Rep. 125.

of their different nature and character. Indeed, the problem of the nonconformity of the goods sold, as regards the quantity of them, seems to be rather simple comparing it with that of the quality. Logically, delivery of the wrong goods altogether would seem to be a more serious failing on the part of the seller than delivery of a lesser or greater amount of the correct goods.¹

Historically, the obligation of the seller to deliver goods to the buyer, which should be suitable for a particular purpose or should be of merchantable quality, is based on a kind of warranty, beyond his obligation which is derived from his agreement, i.e. the contractual obligations of the seller about giving goods possessing the contractual qualities and characteristics. Most of the modern legal systems have accepted this approach. The German law of sale and the laws which belong to the same group use the term "guaranty liability" (*Gewährleistungspflicht*).² But the German theory does not sufficiently distinguish between the nature of the two terms "obligation" and "liability", and gives therefore cause for many controversies.³ Likewise, in the common law system there were a number of warranties, before the Sale of Goods Act was passed, corresponding to the terms contained in ss. 12-15 of the Act, which in the absence of a contrary intention expressly declared by the parties were implied into contracts for the sale of goods. If a warranty was broken the buyer as the injured party could repudiate the contract, if he was able to show that

¹ See D.W. GREIG, *supra* p.117.

² In the Greek Civil Code this "guaranty liability" of the seller is based on its Arts. 534 *et seq.*

³ See further, SUSS, "Wesen und Rechtsgrund der Gewährleistung für Sachmängel", 1931, pp.223 *et seq.*; cf. BLOMEYER, in "Deutsche Landesreferate zum III: Internationalen Kongress für Rechtsvergleichung", 1950, pp.356 *et seq.*

compliance with the warranty was a condition precedent to his own liabilities under the contract. Because of the importance of the suitability of goods, or their merchantability, breach of one of these implied undertakings by the seller would usually constitute a breach of condition as to this subject. But the trend of the common law now, according to the s. 13 of the Act, as regards the mentioned problem, is that a failure of the seller to provide goods answering the contract description amounts to a failure to perform the contract rather than a breach of any term implied in the contract, i.e. a warranty, since it is provided:

*"Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."*⁴

The effect of s. 13 was to make all descriptive words, which were contractual, conditions of the contract instead of their purpose as subsidiary parts of the contract prior to the 1893 Act. In that case the descriptive words went to the root of the contract, whereas in the opposite case there were those conditions that gave no right to the injured party to repudiate the contract, but which might or might not give rise to action in damages. This right of the buyer can be operated automatically as a basis upon which he could, if he wished, repudiate the contract, even in a case of the failure of the seller to satisfy one part of the description of minor significance.⁵

⁴ s.13 (1).

⁵ See further S.W. GREIG, *supra* pp.126, 175.

It is worth mentioning the Lord ABINGER'S point in his well-known dictum in Chanter v. Hopkins,⁶ when the declination from the previous doctrine of the common law started to be evidenced:

"In many of the cases . . . the circumstance of a party selling a particular thing by its proper description, has been called a warranty; . . . but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill; as, if a man offers to buy peas of another, and he sends him beans, he does not perform his contract, but that is not a warranty; . . . that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."

In the Uniform Law of Sales Article 33 consists of a list of ways in respect of which a lack of conformity can occur and includes defects in quantity as well as in quality. The seller's obligations as regards the conformity of the goods in the Law correspond to the contractual terms laid down by sections 13-15 in the Sale of Goods Act. These provisions of the Law, it is true, are to some extent similar to those of the common law provisions, but they have been drafted in a rather more practical way, corresponding to modern commercial practice. This part of the Law has avoided the Civil law concepts of "fault" in relation to breach. The most important rule in this part of the Law is the general rule according to which the goods must possess the qualities and characteristics expressly or by implication contemplated by the contract.⁷ It seems that this rule will be utilised as a useful instrument by the national courts in their efforts to interpret sale contracts using it as an escape from the confusion of the legal local idioms and traditions, which create great difficulties in the solution of the relative problems.

⁶ (1838) 4 M. & W. 399, p.404.

⁷ ULIS, Art.33 (1), (f).

The seller's obligations dealing with the quality of the goods, as they are expressed by Article 33 of the Law, in the aforementioned list, are based on some criteria of defect as to conformity, which have some similarities with those of the corresponding rules of the Sale of Goods Act 1893.⁸ But apart from these similarities, the scope of the criteria employed by the Law seems to be narrower than those of the Sale of Goods Act, as will be evident from the following pages, which will be dedicated to an endeavour to examine these five criteria, as they have been laid down by the Law.

1. *Qualities and characteristics*

As has been said before, the Law in order to establish a framework of the seller's obligations as to the conformity of the goods, uses a general rule in the sub-paragraph (f) of Article 33 stating that the seller shall not have fulfilled his obligations to deliver the goods, where he has handed over⁹ ". . . goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract". This comprehensive style employed by the Law in defining such a large theme has been criticised as insufficient, especially by the common law legal system lawyers.¹⁰ This rule constitutes the generalization of a complete series of details of the

⁸ ss.13-15. The common law started from the principle of *caveat emptor* but nowadays this rule seems to have been put aside in the judicial practice. Prof. ATIYAH ("The Sale of Goods", 2nd ed. pp.52-53), classifies the seller's obligations to supply goods of proper quality under six criteria, the following:

1. Implied conditions that goods must correspond with their description.
2. Implied conditions that the goods are merchantable.
3. Implied conditions that the goods are fit for a particular purpose.
4. Implied conditions in sales by sample.
5. Implied conditions annexed by trade usage.
6. Other implied terms.

⁹ ULIS Art.33 (1).

¹⁰ There will be recalled the controversial discussion in the Conference (8th Meeting, Committee on Sale) as regards the existence or alteration (cont.

relevant rules (they will be examined separately), in order to elaborate the issue which provides that the goods must possess the qualities "necessary ~~for~~ commercial use", and also the qualities "for some particular purpose expressly or impliedly contemplated by the contract", and so on.

The expression "qualities and characteristics" corresponds to sections 13, 14 and 15 of the Sale of Goods Act, 1893, in which the old principle of *caveat emptor* is still applied where the circumstances envisaged by these rules are not satisfied. In the Roman law systems, liability for non-performance is based on the fault (*culpa*) of the party who has the duty to perform a particular obligation. In French law if the non-performance or late performance was ^{not} caused either by the fault of the seller, his servants or agents, or ^{was caused} by some fortuitous event (*force majeure*) the seller is absolved. The burden of proving these facts is on the obligor.^{10a} In German law, Greek law and the related legal systems, the seller is liable for the performance of his obligations unless he can prove that the non-performance was not due to his fault;¹¹ but in that case there is a duty on him to inform the buyer about the impossibility of the performance without his fault.

English courts often refer in cases of breach to the guilty and to the innocent party, instead of the terms breach and fault used by

¹⁰ (cont.)

of this provision in the Law, between the delegation of different countries, where the United Kingdom delegation strongly supported the elimination of this provision in the attempt "to relieve the seller of the heavy obligations imposed on him by the text". (See the discussion in RECORDS AND DOCUMENTS OF THE CONFERENCE, Vol. I, p.64 *et seq.*).

^{10a} French Code Civil, Arts. 1147, 1148.

¹¹ German Civil Code, ss. 275, 282; Greek Civil Code, Arts. 380-381 which are interpreted in combination with Arts. 336, 342 and 363.

Continental laws.¹² However, the variation in approach, as regards the present problem, between the two legal worlds, i.e. the civil law and the common law, seems to be rather theoretical because in practice the results have made possible the unification of the law on sales which, in fact, is a compromise of the two legal systems, in the form of the so-called: Uniform Law on International Sales.

The expression in the Law "*. . . qualities and characteristics . . . contemplated by the contract*", corresponds to the term "description" in the Sale of Goods Act, 1893, the meaning of which contains two elements: the identification and their characterisation. But it is a question of construction whether any condition in a contract, expressly or impliedly used by the parties, is to be taken as helping to identify the goods or as qualifying their character. A general rule of the undertakings as to quality of the goods in the English courts' practice is the definition following two decisions of the House of Lords,¹³ in the spirit of which, goods would be of merchantable quality if in the form in which they were tendered they would be used by a reasonable man for some purpose for which goods of the same quality and the same general character and designation would normally be used, so as to be saleable under the description by which they were sold at a price not substantially less than the contract price.¹⁴ On the other

¹² There was a relevance between the Civil law systems and the Scots law in this subject: Indeed, by s. 6, Mercantile Law Amendments Act, 1856 (of Scotland) it was provided that if the seller did not know the goods to be defective or of bad quality, the goods, with all faults, should be at the risk of the purchaser, unless there was an express warranty or unless the goods were expressly sold for a particular specified purpose. But now a uniform rule has been laid down under the Sale of Goods Act, 1893, for both the English and Scots law.

¹³ (a) Henry Kendall & Sons v. William Lillico & Sons Ltd. [1968] 2 All E.R., p.451; [1969] 2 A.C., p.77, per Lord REID. (b) B.S. Brown & Son Ltd. v. Craiks Ltd. [1970] 1 All E.R., p.825; [1970] 1 W.L.R. p.754, per Lord REID.

¹⁴ See further, M. MARK, "Chalmers Sale of Goods Act 1893", 17th ed., pp.128-129, (where there is expressed the opinion that it would be dangerous to treat this definition as universally accurate).

hand, in cases like Arcos v. Ronaasen & Son,¹⁵ the courts have adopted the opposite approach taking as a measure a subjective criterion. In the case just-mentioned the contract was for the sale of staves to be $\frac{1}{2}$ inch thick. Some were of that thickness, others were not. Despite this discrepancy, the staves could still be used for the purpose for which the seller knew the buyer was going to use them. However, the House of Lords held that the buyer could reject the goods since they did not answer to the description in the contract. According to Lord BUCKMASTER'S statement:¹⁶

"If the article they (the buyers) have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought."

It is clear that this attitude lies at a semantic distance from the fair and realistic solution given by the Law in such a case by the adoption of the principle that the defects must be "material".¹⁷

Another illustrative example on this point is the case of Re Moore & Co. v. Landauer & Co. where, as has been seen before,¹⁸ the buyer refused to accept the goods delivered, although the total quantity of tins ordered was corresponding to the conditions of the contract as regards the qualities and characteristics; nevertheless, it was held that the buyer was entitled to reject the whole consignment.

This variety of decisions in sale contracts, generally speaking, is the result of the variety in the sale transactions. This

¹⁵ [1933] A.C. 470.

¹⁶ Ibid, p.474.

¹⁷ ULIS Art.33, (2).

¹⁸ [1921] 2 K.B. 519; [1921] All E.R. Rep. 466, (see, supra, p.33).

subject of the law in every legal system (in every modern legal system, in particular), constitutes the most live field of contract law, because it is combined with an endless diversity of transactions of different goods with a variety of shades and patterns. This variety of goods demands an analogous treatment by the law in order to correspond to the modern mercantile needs. On the basis of these pressures, the law of sales has been developed in a peculiar way taking into consideration, in the establishing of its rules, the parties' intention in their transactions. There is no other subject in the law to which such weight is given to the intention of the parties as in the law of sale.¹⁹ These observations give an idea of the problems which a tribunal comes across whenever it is bound to interpret the conditions and find through them the real intention of the parties, in a contract of sale of goods, either in a national case or one of international character, and particularly as to the definition of the obligations of the parties drawn out from the relevant terms expressly or by implication contemplated by the contract. The present general rule of the Law applies specifically whether the goods are specific, or unascertained, or new or second hand, and then the task of the tribunal or arbitrator is to find out, according to the special circumstances, if the goods are reasonably fit for the purpose for which they are required. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, provided that the goods are of a description which is in the course of the seller's business to supply,²⁰

¹⁹ The Continental laws distinguish between two categories of sale law rules: The *mandatory rules* and *non-mandatory ones*. Their law of sales is characterised, that is mainly covered throughout its area, by *non-mandatory rules*.

²⁰ But see, *Spencer Trading Co. v. Devon* [1947] 1 All E.R.284, where the sellers were suppliers of gums and resins. The buyer ordered from them gums suitable for making fly paper, but the gum sold was not fit for that purpose. It was held that although the sellers only rarely supplied gum for that use, it was still an article of a description which it was in the course of their business to supply.

(whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. The justification of this approach is obvious. In Prof. HONNOLD'S remarks:²¹

"The first observation is that expectations of the parties about the quality of the goods are real and central to the transaction . . . One becomes dizzy trying to imagine a sales transaction without a real and specific expectation about the quality of the goods, although many of these expectations (steel beams without cracks; a lathe that turns) may be so obvious that they go without saying."

Many of the expectations of the parties will have been expressed; others can be implied from the course of their prior dealing or from the usage of trade. In the expression of the Law, as regards the latter case:²²

"The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves."

This approach of the Law expressed in the above rule seems to be in line with the judicial practice of the Scottish courts.²³

Further, the Law provides:

*"Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned."*²⁴

²¹ J. HONNOLD, *supra*, p.336.

²² ULIS Art.9(1).

²³ See, *McCutcheon v. David MacBrayne Ltd.* 1964 S. C. (H.L.) 28 H. L.; [1964] 1 All E. R. 430, where Lord PEARCE, explaining the existence of a special contract in the absence of a written contract of a contract made orally in express terms between the parties, pointed out that such conditions "are hampered by the fact that the common law already implies a contract between carrier and customer (in default of other agreement) to the effect that a carrier will be entitled to a reasonable reward and that he must carry the goods with care and will be liable for negligence."

²⁴ ULIS Art.9(3).

Usages and practices, as well as expressions, provisions or forms of contract commonly used in commercial practice, may be established by any form of evidence admissible under the *lex fori*.²⁵ Where no such expectations have been expressed, an attempt at precise rules of construction interferes. On this point the Publications of the International Chamber of Commerce, as well as the international standard contracts,²⁶ will be a useful guide in connection with the application of Article 9 (3) of the Law. Indeed, in every contract of sale there are some details in the agreements between the parties, not always put in a clear way, which require an interpretation by courts, especially those agreements including discrepancies arising from the implied warranties as to qualities or fitness of the goods, if the parties had referred to such terms in their contract. If the goods are required for a particular purpose, this particular purpose must be communicated in such a way that the seller knew he was being relied upon.²⁷ In Teheran Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.,²⁸ the buyers who had purchased a quantity of air compressors let the sellers know that they (the buyers) were to export the goods to Persia. DONALDSON, J. held on the ground of this fact that the goods were warrantied suitable for that purpose. The Court of Appeal reversed this conclusion on the ground that the particular purpose for which the goods were required was insufficient. There are also some observations of DIPLOCK, L.J., in this case²⁹ which are worth mentioning:

²⁵ See further, R. GRAVESON, E. COHN, D. GRAVESON "Uniform Law on International Sales Act 1967", p.54.

²⁶ In Prof. SCHMITTHOFF'S opinion in "International Institute for the Unification of Private Law", vol.II (1967-8), p.98: "*The unification of international trade law by means of model contracts may prove to be more fruitful than that by means of international conventions.*"

²⁷ Under the Uniform commercial Code, s.2-315, the implied warranty applies unless excluded or modified under s.2-316, "*where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.*"

²⁸ (cont.)



"Where a foreign merchant . . . buys by description goods . . . for resale in his own country, of which he has no reason to suppose the English seller has any special knowledge, it flies in the face of common sense to suppose that he relies on anything but his own knowledge of the market in his own country and his own commercial judgment as to what is saleable there. To hold the contrary would mean that whenever anyone known by the seller to be a foreign merchant bought from a seller in England goods for sale in his own country there would rise automatically an undertaking on the part of the seller, unless he expressly disclaimed it, that the goods would be suitable for sale in the market of which the foreign buyer knew everything and he, the seller, knew nothing. With great respect that would be nonsense."

The results will be different when the goods are of a kind such as to be used for one purpose for which goods of that kind can normally be used or when goods have only one use in the ordinary course of things, and are not fit for that use.³⁰ In the case of second hand goods sale the buyer must not expect them to be in the same position as new ones, but they may be reasonably fit for their purpose and merchantable even though defective.³¹ The question, of course, is what is the criterion employed to measure the conditions of merchantability in second-hand or sub-standard items. It might seem reasonable that in such transactions the surrounding factors must be examined as, e.g. the price, the mercantile customs, and so on. One, for example, who buys a 1952 old car for £40 cannot expect it to be as fit for driving as another 1964 car purchased for £300.

²⁸ [1968] 1 All E.R.585.

²⁹ [1968] 2 Q.B.545, pp.560-1; [1968] 2 All E.R.886, p.894.

³⁰ See, Grant v. Australian Knitting Mills Ltd. [1936] A.C.85.

³¹ See, Bartlett v. Sidney Marcus Ltd. [1965] 2 All E.R.753; [1965] 1 W.L.R.1013.

2. *Goods of different description or different kind*

The first criterion employed by the Law to this subject is that which deals with the defects of the goods, where they are not "*those to which the contract relates or goods of different kind*", according to the articulation of Article 33, paragraph 1 (b). This expression refers to the contractual provisions in a contract of sale that the goods should answer their description, if the sale is a sale by description. A sale by description may be written or a contract made orally in express terms between the parties. The question is if the parties had not embodied such a description in their contract, would this be a contract by description? According to the prevailing approach to this matter the exclusion of any warranties in the contract would have no effect on the obligation of the seller to deliver goods answering the contract description, taking the term "description" in its widest meaning, because this condition arises from the contract itself and not from any warranty express or implied, as Lord ABINGER stated, in Chanter v. Hopkins.¹ The problem arising in this matter is a dual one: (a) when a contract of sale is a sale by description² and (b) when the goods sold answer to the description of the contract. In the case of an international sale of goods, usually the goods to be sold must be certain and, more specifically, "*goods . . . those to which the contract relates . . .*", according to the particular expression of the Law. If, therefore, the goods do not fulfil this condition "or" if they are "goods of a different kind" they do not correspond with their description. The form of the text of the Law seems to be more sensible

¹ (1838) 4 M. & W. 339, p.404.

² The text of the Law does not use the term "description" as does the Sale of Goods Act, but there is no doubt that the equivalent meaning is intended by the Law.

on this point, since it has avoided the term "description", comparing it with that of s. 13 of the Sale of Goods Act 1893, which creates difficulties as to the meaning of the term "description". Indeed, the meaning of this term is open to doubt and it has been described as "wholly superfluous",³ because *"it may refer to factors relevant to the definition of the goods or to other attributes which are stated and believed by the parties to apply to defined goods"*.⁴ There is no doubt that in a contract by correspondence, as an international sale contract usually is, the goods must be sold by a kind of description written or verbal. On the other hand, there are many cases which suggest that even in a sale in a shop, where the goods are on display, even though description is impossible, the contract will be by description. The statement per Lord WRIGHT in Grant v. Australian Knitting Mills Ltd. is, to a certain extent, of historical importance for this method of approach:

*"it may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g. woollen under-garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations."*⁵

The significance in the distinction between the identification of the goods, i.e. the possession of special attributes by them, and the characterisation of them, namely their classification, on factors of their character, has as a result that if the seller delivers goods

³ See, G.J. BORRIE, *Commercial Law*, 3rd ed. (1970), p.85.

⁴ See, G.H.L. FRIDMAN, *Sale of Goods*, p.151.

⁵ [1936] A.C.85, p.100; [1935] All E.R. Rep.209, p.215.

defective in their character the buyer can reject them and claim for a breach of contract even though an exemption or exclusion clause was given to the seller by the buyer. In this case the seller is obliged to deliver not only the right kind of goods but also goods possessing the appropriate characteristics or qualities. In the opposite case of the identified goods, an exclusion clause contemplated by the parties can release the seller from his liability for a breach of the contract.⁶

The problem of the description in the contracts of sale had been studied by the Law Commission. In order to resolve the difficulty, the Supply of Goods (Implied Terms) Act, 1973, s. 2 has renumbered s. 13 of the Sale of Goods Act, 1893, as s. 13 (1), and added a sub-section (2), which provides:

"A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer."

If the goods do not fit the contractual description or if they are of different kind then, unless the discrepancy is not material, the buyer is entitled to reject the goods as failing to conform to the description even though the goods are merchantable. It has been held by the Courts in Britain that some characteristics of the goods sold constitute a contract of sale by description. In Arcos Ltd. v. E.A. Ronaasen & Son,⁷ as we have seen,⁸ the House of Lords held that the buyer was entitled

⁶ See further, G.H.L. FRIDMAN, *supra*, pp.151 *et seq.*

⁷ [1933] A.C.470; [1933] All E.R. Rep.646.

⁸ See, *supra*, p.48. The argument was for a quantity of staves in specified thickness of $\frac{1}{2}$ inch; about 80 per cent of the staves were more than $\frac{1}{2}$ inch but not more than $\frac{9}{16}$ inch thick, except for a small number which exceeded $\frac{5}{8}$ inch in thickness. The buyer rejected the staves on the ground that they did not answer to the contract description.

to reject although it was apparent that the goods were still suitable for the buyer's intended purpose. In Lord ATKIN'S words in this case:

*"If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does $\frac{1}{2}$ inch mean about $\frac{1}{2}$ inch. If the seller wants a margin he must and in my experience does stipulate for it."*⁹

In Re Moore & Co. v. Landauer & Co.¹⁰ it was held, also, that the buyer was entitled to reject since the goods were of different description from that stipulated in the contract, although the goods delivered were in the right quantity and of the right value under the contract. It was held that the buyer had been in breach of s. 13 of the Sale of Goods Act. It was stressed that the possible sub-sales might make the contents of each case a vital matter. This seems to justify this approach because,

*"in an age when technological advances have made it essential that goods, or their components, should be made with the greatest precision, it would be accepted that the description of goods may be applied with equal precision."*¹¹

To a certain extent the same policy seems to have been accepted by the Law as regards this problem. The discussion of the Conference,¹² for example, made clear that goods must possess the qualities for ordinary and commercial use - this subject will be explored in more detail later - even though they are unsuitable to the buyer, because they do not comply with the requirements of local statutes, e.g. sanitary or food legislation.¹³ But it must be mentioned that this approach

⁹ [1933] A.C.470, p.479; [1933] All E.R. Rep.646, p.650.

¹⁰ [1921] 2 K.B.519 (See, supra, p.33.)

¹¹ D.W. GREIG, supra, p.121.

¹² RECORDS AND DOCUMENTS OF THE CONFERENCE, Vol. I, p.65.

¹³ See, R.H. GRAVESON, E.J. COHN, D. GRAVESON, supra, p.73.

is limited in the Law, by the rule of the second paragraph of Article 33, which states that any defects of the goods sold must be "material" in order to be considered as such. By adopting this approach the Law seems to be given a realistic and fair solution corresponding to the modern trade requirements. The expression in the text "goods of different kind" corresponds with the s. 30 (3) and s. 13 of the Sale of Goods Act, and can also apply to a situation where the goods are adulterated by mixture with some other substance, which is not what the buyer wants to buy. In this case if the goods are physically mixed with the "foreign matter" and, therefore, they are in a situation of a "physical confusion", then this fact renders the contracted goods useless to the buyer and he is entitled to reject them. On the other hand, if the goods are not physically mixed and it is possible for the buyer to separate them out, then he can keep those goods which correspond with the contract description and reject the rest, *"provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense."*¹⁴

This concept has been accepted by the common law judicial practice in closely resembling cases. In Pinnock Bros. v. Lewis and Peat Ltd.¹⁵ the buyer purchased from the seller a quantity of East African copra cake under the terms of a contract which stated that *"the goods are not warranted free from defect rendering them unmerchantable which would not be apparent on reasonable examination"*. The copra cake was resold and used as cattle feed. It was discovered that the cake

¹⁴ ULIS Art.44(1).

¹⁵ [1923] 1 K.B.690.

contained an admixture of castor beans that made it toxic to animals. Although an exemption clause had been included in the contract in order to limit or exclude the seller's liability, ROCHE, J. held¹⁶ that it could not exclude the seller's liability because "*the goods delivered did not comply with the contract but were totally different from what was contracted for*". In some cases even a minute addition of a "foreign matter" in the goods sold, the nature of which can affect them so as to make them different in quality, should be sufficient to render the goods non-corresponding with the description of the contract. In other cases such an affection can be extremely drastic to the goods with disastrous effects when the foreign element consists of explosive or poisonous substance, to mention only a few examples. A precise illustrative example to this concept is the following decision of the Scots Courts: In John Duke v. Alexander Jackson¹⁷ a bag of household coal purchased from a coal merchant contained a detonator which exploded while the coal was being burned in a kitchen fire. The purchaser, who was injured by the explosion, brought an action of damages against the seller, averring that he had made known to the seller the particular purpose for which the coal was required, *viz.* ordinary domestic consumption; that he relied on the seller's skill or judgment to supply him with coal in a condition suitable and safe for that purpose; that it was in the ordinary course of the seller's business to supply such coal; that he had failed to do so; and that he was accordingly in breach of the warranty as to fitness implied by s. 14 (1) of the Sale of Goods Act, 1893. It held that these averments were irrelevant to

¹⁶ See also, Robert A. Munro & Co. Ltd. v. Meyer, [1930] 2 K.B.312; [1930] All E.R. Rep.241.

¹⁷ 1921 S.C.362.

instruct breach of the warranty implied by the section, in respect that they did not set forth any defect in the fitness of the goods supplied in terms of the contract, i.e. the coal, but *merely the presence of a foreign substance*¹⁸ which was not a subject of the contract of sale.¹⁹

On the other hand, in Paul Ltd. v. Pin & Co.²⁰ where the contract referred to "the cargo" of maize shipped on a certain vessel, the 58 tons of tobacco which had been smuggled on board the ship and were not mentioned on the bills of lading, it was held that the buyer was not entitled to reject the quantity of the maize which corresponded with the description of the contract because the right quantity was not so mixed up with the wrong one, and it was therefore easy for the buyer to separate them.

3. *Sale by sample or model*

The sub-paragraph (c) of paragraph 1 of Article 33 states that the seller shall not have fulfilled his obligation to deliver the goods where he has handed over: "*goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer.*" This provision of the Law makes clear that for there to be a sale by sample there must be an express or implied agreement included in the contract to that effect. The expression of the Law ". . . *sample or model which the seller has handed over or sent to the buyer . . .*", leads to this approach. If there is not such an express term in the body

¹⁸ The emphasis added.

¹⁹ Cf. Wilson v. Rickett, Cockerell & Co. Ltd., in which part of a consignment of coal exploded when placed on the buyer's fire, the foreign element that caused this explosion was minute in quantity in relation to the consignment as a whole, but its presence would have been sufficient to establish a breach of s.13 of the Sale of Goods Act, had the buyer attempted to rely upon that section in bringing his claim. ([1954] 1 Q.B.598; [1954] 1 All E.R.868.)

²⁰ [1922] 2 K.B.360.

of the contract, that the sale would be a sale by sample, then it is the court's task to find out whether there is included an implied term which renders the contract as such, *"in accordance with the principles relating to the construction of contracts and the rules regarding the implication of terms"*.¹

The Law following the approach of the common law system in this subject, also, distinguishes between the two kinds of sale,² i.e. sale by description and the sale by "sample or model", although there are many similarities in these two kinds of sale.

The importance of the sale by sample becomes evident in the everyday transactions, but Lord MACNAGHTEN had clearly explained its basic philosophy and purpose in Drummond v. Van Ingen,³ the leading case in the field of common law, of which the general significance is obvious:

"The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time."

The text of the Law uses the expression: "sample or model". Indeed, there is a distinction between the meaning of these two words. The

¹ G.H.L. FRIDMAN, *supra*, p.175.

² ULIS Art.33(1), (b) and (c).

³ (1887), 12 App. Cas. 284, p.297.

sample "speaks for itself" and in a contract by sample the goods must correspond to the sample but the purpose of a model is to act as a guide as to the quality and description of the goods, although in many cases a sample is sent by the seller in order to describe the quality and characteristics of the goods. In this case the sale is a sale by description from samples.⁴ To avoid this confusion of purpose, in the sale in which samples are used it must be clear in the contract by an express or implied condition that the sale is by sample. If a sale by sample is also a sale by description, then the bulk must correspond not only with the sample but with the description as well. There is another possibility, namely, that a contract has been written and signed by the parties without any condition in it that it is a sale by sample, but in which the buyer might invoke a collateral agreement that the bulk would correspond with the sample, or relied upon the ground of special usages of the trade for a particular commodity. In this case the sale can be a sale by sample, although there is no expressed or implied condition in the contract itself about that. This attitude has been adopted in some cases by the English courts,⁵ because very often goods ordered are not of the standard of those on display, though they are merchantable and correspond with the description.

Whether the goods correspond with the sample or not is a question to which the answer will be given, in any case, by the court in accordance with the conditions of the contract and the trade usages.

⁴ See, K.C.T. SUTTON, *Sale of Goods*, p.165.

⁵ See, *L.G. Thorne & Co. Ltd. v. Thomas Borthwick & Sons (Asia) Ltd.*, (1956) 56 S.R. (N.S.W.) 81; *Syers v. Jonas* (1848) 2 Ex.111; *Lamson Paragon Ltd. v. Spicers (Australia) Ltd. & H.C. Sleigh Ltd.*, (1953) S.A.S.R.297, 300.

In Hookway (F.E.) & Co. Ltd. v. Alfred Isaac & Sons,⁶ a relevant English case, the practice of the London Shellac market under delivery contracts was that all shellac should be certified by a Committee as conforming to certain standards; and apart from tests to establish the resin content, the quality of the shellac was determined by visual examination alone. Because increasing amounts of shellac reaching the market were proving unsuitable for some purposes, the buyer had a quantity of shellac that was tendered to him analysed. The analysis showed that in one particular respect the shellac was not equal to the standard sample. Nevertheless, DEVLIN, J. held that such a test was inadmissible to show that s. 15 (2) (a) of the Sale of Goods Act had not been complied with, because the quality of the goods referred only *"to such qualities as are apparent on an ordinary examination of the sample as usually done in the trade"*.⁷ It was held that the term "as to quality" applied only to such qualities as were discoverable from such examination as under the circumstances the buyer might reasonably be expected to make and not to submit the goods to unusual tests to prove that the shellac (or the bulk) did not correspond to the sample in respect of certain characteristics which did not affect its apparent qualities and merchantability, because the shellac was apparently merchantable for other purposes.

Finally it must be mentioned that according to the Law's rule the buyer loses his right to reject the goods which do not correspond with the sample or model "handed over or sent" to him, if *"the seller has submitted it without any express or implied undertaking that the goods would conform therewith"*.⁸ This rule of the Law corresponds to

⁶ [1954] 1 Lloyd's Rep.491.

⁷ [1954] 1 Lloyd's Rep. p.511. In that case the contract of sale provided that the quality of the goods was to be equal to London Standard Sample, "F.O. Pure T.N. 1951", and this was treated as analogous to sale by sample where there was one standard sample.

⁸ ULIS Art.33(1) (c).

s. 15 (2) (a) of the Sale of Goods Act, which provides three implied conditions in contracts of sale by sample:

"(a) There is an implied condition that the bulk shall correspond with the sample in quality.

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.⁹

(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."

The last condition renders the seller generally liable for any defect of the goods, but he escapes liability if the defect in the goods could have been discovered by reasonable examination of the sample, whether in fact the buyer has made any examination or not. Moreover, if the goods do not correspond to the sample, as the (a) implied condition provides, there is no defence that they could be made to correspond with the sample by a simple process on the buyer's part.

In E. & S. Ruben Ltd. v. Faire Bros. & Co. Ltd.¹⁰ where vulcanised rubber material was sold by sample, it was held that the seller had failed to deliver rolls corresponding to the sample because the rubber was "*crinkly and folded in some cases*", although the rubber sold could have been made to correspond to the sample by warming and pressing out the folds and the crinkles.

⁹ To this subject is given a special process by the Law in Arts.38-39, which will be examined in detail later.

¹⁰ [1949] 1 All. E.R.215; [1949] 1 K.B.254.

4. *Qualities for ordinary and commercial use*

The Law in Article 33, paragraph 1, sub-paragraph (d) provides that the goods must "*possess the qualities necessary for their ordinary or commercial use*". In every contract of sale of goods there is an implied obligation of the seller that the goods sold must be of merchantable quality. This obligation of the seller constitutes a sort of guarantee or a "guaranty liability", according to the civil law's relevant wording.¹

The condition of the Law that the goods must be of merchantable quality corresponds to the rule of s. 14 (2) of the Sale of Goods Act, as this rule has been altered by the Supply of Goods (Implied Terms) Act 1973. This Act included for the first time, in its s. 7 (1), a definition of the term "merchantable quality" providing now:

"Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly."

Under the above mentioned rule of the Uniform Law and its expression "for ordinary and commercial use" it is made clear that it uses two criteria to define the merchantability of goods sold, namely, the "ordinary" use and the "commercial" one. This wording of the Law is designed to deal with the same problem in sales of goods which negotiate the essence of the common law warranties of merchantable quality and fitness for purpose.

¹ See, *supra*, p.42.

According to the practice of the common law courts the goods may be regarded as of merchantable quality although they happen not to be saleable in the place where the seller knows that the buyer intends to resell them. This attitude is the result of the distinction between two conditions, i.e. that the goods should be "merchantable" and that the goods sold should be of "merchantable quality". This latter is the prevailing approach, and, according to BANKES, L.J. is the more restricted.²

On the other hand, in Niblett, Ltd. v. Confectioners' Materials Co. Ltd.,³ a case in which the sellers sold the buyers condensed milk packed in tins bearing labels, when the goods were delivered it was discovered that some of the tins bore labels marked with the "Nissly" brand. The buyers were refused permission to export the tins and sold them in that state because that brand infringed the trade-mark of the Nestle Co. So, they had to remove the labels and sell the milk at a low price. They sued the sellers, claiming damages, on this ground. It was held that to entitle the buyer to dispose of the property in the goods, it is not enough that there is some legal obstruction to the free disposition of them, which means that the goods had to be "merchantable" and the buyer to be able to resell them. Accordingly, two different schools of judicial thought, created in the English Courts, produced difficulties in the interpretation of the term, "merchantable quality" of the Sale of Goods Act, 1893. What does, really, the expression, that the goods must be "saleable by the buyer" or "usable

² Sumner, Permain & Co. v. Webb & Co. [1922] 1 K.B.55, p.60; [1921] All E.R. Rep.680, BANKES, L.J., is of the opinion that the condition is not that the goods should be "merchantable", but that they should be of "merchantable quality". This is more restricted, BANKES, L.J. added, than it would have been if it had required that the goods should be "merchantable". The definition of the latter term has been given by the Supply of Goods (Implied Terms) Act 1973, as has been mentioned above.

³ [1921] 3 K.B.387; [1921] All E.R. Rep.459.

generally by the buyer", mean? In the old case of Cordiner v. Gray,⁴ Lord ELLENBOROUGH said that goods to be merchantable must be "saleable" and the purchaser was not to be expected to buy goods "*to put them on a dunghill*". This division of opinion and the problems in the interpretation of the relevant rule in the common law system thus created, led the drafters of the Law to put down the rather clear expression "ordinary and commercial use". These two criteria used by the Law ended the struggle of the judicial variety of opinion on this problem, and entrusted courts with the task to define, in every case, whether the goods sold in a certain contract are in an "ordinary" state or suitable for "commercial use". It is worth referring to some cumulative requirements relating to the merchantable quality of the goods, which have been laid down by the Uniform Commercial Code.⁵ According to these requirements, goods, to be merchantable, must be at least such as: (a) pass without objection in the trade under the contract description, (b) in the case of fungible goods, are of fair average quality within the description, (c) are fit for the ordinary purposes for which such goods are used, (d) are, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved, (e) are adequately contained, packaged, and labelled as the agreement may require, and (f) conform to the promises or affirmations of fact made on the container or label, if any.

Generally speaking, the problem of the definition of the term "merchantable quality" is not an easy question to answer and in actual fact has demanded interpretation from the courts. Indeed, BLACKBURN'S, J.

⁴ (1815) 4 Champ.144; See also Wieler v. Schilizzi, (1856) 17 C.B.619; Bristol Tramways Co. v. Fiat Motors Ltd. [1910] 2 K.B.831.

⁵ UCC s.2-314.

viewpoint seems to be rather realistic in one of the old English cases,⁶ that the question whether goods are fairly and reasonably merchantable is a question which must be left more or less to the jury as reasonable men to determine. This matter, undoubtedly, creates more difficulties in a case of international sale where the distance between the approaches of courts of different countries is wider, than it is between the courts of the same country. Finally must be mentioned the adopted concept dealing with cases of second-hand goods, that they are merchantable if they are in usable condition even though not perfect.⁷

5. *Qualities for some particular purpose*

The Law examining the "qualities and characteristics" of the goods, finally, contains another special rule as regards the conformity of the goods in a sale contract: the provision of qualities for "some particular purpose".¹ This expression at a first glance seems to be superfluous comparing it with the previous rules of the same Article, which seem to cover this condition as, for instance, "*qualities necessary for their ordinary . . . use*". But this special rule in the Law which deals with qualities for a particular purpose, which is based on the express or the implied agreement of the parties, seems to be justifiable and useful, because some disputes can be avoided in the interpretation of such a contract of sale. There remains, of course, the difficult question of defining when the goods possess such qualities and, therefore, fulfil this particular purpose. It is the task of the competent court to give an answer to this question, using "*the general principles on which the present Law is based*", according to the wording of the rule of Article 17 of the Uniform Law on Sales. "*Particular*

⁶ *Jones v. Just* (1868) L.R.3 G.B.197.

⁷ Per Lord DENNING, M.R. in *Bartlett v. Sidney Marcus Ltd.* [1965] 2 All E.R.753, 755.

¹ ULIS, Art.33(1) (e).

purpose expressly or impliedly contemplated" corresponds to s. 14 (3) of the Sale of Goods Act, as it has been substituted by s. 3 of the Supply of Goods (Implied Terms) Act 1973. This rule states:

"Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment."

It is obvious from the present rule that the Sale of Goods Act deals in detail with this subject, while the relevant rule of the Law seems to be rather a general rule. Nothing in the Law, for instance, corresponds to the reliance *"on the seller's skill or judgment"* in s. 14 (3).² The definition of the term "particular purpose" is a question of fact but must be stated, in any case, with reasonably sufficient precision. In many instances, the purpose for which the goods are required is obvious. According to the view expressed in Grant v. Australian Knitting Mills Ltd.:³

"there is no need to specify in terms the particular purpose for which the buyer requires the goods . . . because it is the only purpose for which any one would ordinarily want the goods."

Thus, in the case of Chapronière v. Mason⁴ it was easy for the court to infer that the seller must have known the purpose for which the purchaser

² See, Henry Kendall & Sons v. William Lillico & Sons Ltd. [1968] 2 All E.R., pp.465, 475, 482-83, 490; [1969] 2 A.C., pp.93, 105, 114, 123.

³ [1936] A.C.85, p.99; [1935] All E.R. Rep.209, p.215.

⁴ [1905] 21 T.L.R.633; see also Preist v. Last [1903] 2 K.B.148.

required the bun. But there are some instances where the want of conformity will not have any effect unless it can be inferred from the circumstances that the buyer required to buy an article for a particular purpose. In that case the BEST, C.J.'s view is applicable: If a seller

*"sells an article, he thereby warrants that it is merchantable - that it is fit for some purpose . . . If he sells it for a particular purpose, he thereby warrants it fit for that purpose."*⁵

But the problem of affixing the seller with knowledge of the purpose for which goods were intended creates some difficulties and is complicated by two facts, as Prof. FRIDMAN remarks:^{5a}

"First, that ~~the~~ goods may have more than one purpose, secondly, that goods may normally have a particular purpose, in the ordinary course of things, which is obvious from the nature of description of the goods."

Where there is an implied undertaking as to fitness for a particular purpose and merchantable quality, purpose and quality must be construed reasonably. In Baldry v. Marshall Ltd.⁶ where the buyer asked a firm of motor dealers for a car that would be suitable for touring, the sellers recommended a Bugatti. A contract of sale was entered into for Bugatti, but after the buyer had used it he found that it was unsuitable for touring purposes. He sued the dealers for breach of contract and the Court of Appeal held that the sellers were in breach of the condition that the car should fit for the buyer's purposes. On the other hand, in the sale of an article which the buyer has in mind to use for a special purpose or where he believes that the goods should possess some special requirement, e.g. he buys brass candlesticks believing them to be made of gold,⁷ he must reveal that purpose or that requirement to the seller.

⁵ In Jones v. Bright (1929) 5 Bing 533, p.544.

^{5a} G.H.L. FRIDMAN, *Sale of Goods*, p.159.

⁶ [1925] 1 K.B.260; [1924] All E.R. Rep.155. See also Bristol Tramways Co. v. Fiat Motor Co. Ltd. [1910] 2 K.B.831.

⁷ See GRAVESON, COHN, GRAVESON, *supra*, p.73.

In Griffiths v. Peter Conway Ltd.⁸ the buyer, a woman with an abnormally sensitive skin, had not revealed this fact to the seller when she bought a Harris Tweed coat. The effect of the cloth on her skin was to cause dermatitis. But the same coat would not have affected the skin of a normal person. Thus, the Court of Appeal held that the seller was not in breach of the condition for the fitness of the article sold. In Ingham v. Emes⁹ it was strikingly stated that, "*the implied term as to fitness is dependent upon proper disclosure by the customer of any relevant peculiarities known to her*". In that case the seller had no reason to be aware of the unsuitability of the article sold. Once the purpose is made clear, there is an implied condition that the goods are fit for that purpose, unless the circumstances suggest otherwise.

THE TIME AS TO CONFORMITY: THE PASSING OF THE RISK

The relevant time to determine as to whether or not the goods are in conformity with the contract, according to the rule of Article 35 (1) of the Law, is

"the time when ~~the~~ risk passes, . . . If risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract."

Moreover, the seller will be liable for the consequences of any lack of conformity occurring even after the time defined by the foresaid rule, if such lack was due to an act of his or of a person for whose conduct he is responsible.¹

⁸ [1939] 1 All E.R.685.

⁹ [1955] 2 Q.B.366, p.374; [1955] 2 All E.R.740, p.742. See also Ashington Piggeries Ltd. v. Christopher Hill Ltd. [1971] 1 All E.R.847, p.873.

¹ ULIS 35, par.2.

From the above rule of the Law it is apparent that to define the time in which the goods have to be in conformity with the contract it is necessary first to define the time when risk is passing. The problem of the passing of the risk is determined by the last six Articles, namely, Articles 96 - 101 of the Uniform Law on Sales. The time when the risk has passed is of great importance, since the transfer of property is defined as an essential element in the Law.² The general rule is that the risk *prima facie* passes with the delivery of the goods.³ On the other hand, the Law defines the meaning of delivery as "*the handing over of goods which conform with the contract*",⁴ and this rule is completed by the wording of Article 97 (1) which runs: "*with the provisions of the contract and the present Law*". If, therefore, the seller delivers goods which do not conform to the contract on a date or at a place other than those provided in the contract, the risk does not pass to the buyer. Further, as we have seen, the Law includes a list of ways in respect of which a lack of conformity can occur which contains defects in quantity or quality.

In every one of the above mentioned defects of the goods the seller carries the risk as long as he has care of the goods and while the buyer is not bound to take them into his care. If the goods perish after the risk has passed to the buyer without any fault on the part of either party, the time when the goods were in conformity or not would be the time of the passing of the risk, again. If the buyer is late in

² R.H. GRAVESON, E.J. COHN, D. GRAVESON, *supra*, p.107.

³ ULIS Art.97 par.1. See J.D. FELTHAM, MODERN LAW REVIEW, vol.30 1967, p.675, where he points out that: "*The concentration on delivery is based on the sensible consideration that the person in possession is in the best position to guard and insure the goods*".

⁴ ULIS Art.19(1).

taking delivery, transfer of risk occurs on the day when the delay begins. There is not any delay on the part of the buyer if the seller offers the goods in a non-deliverable state and the risk, therefore, remains on him (the seller).⁵

The relevant rule under the Sale of Goods Act, 1893 is different: it provides that risk *prima facie* passes with property, irrespective of delivery.⁶ However, the time at which the property is transferred depends upon the intention of the parties, provided that where the contract is for the sale of unascertained goods, no property in the goods can be transferred to the buyer until the goods are ascertained.⁷ "*Ascertained probably means identified in accordance with the agreement after the time a contract of sale is made.*"⁸

⁵ Cf. the relevant rule of the Sale of Goods Act, 1893, s.18, which states: "*Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.*" On this base the Court of Appeal held, in Kursell v. Timber Operators and Contractors Ltd. [1927] 1 K.B.298, that the timber could not be regarded as in deliverable state. There were a number of reasons for this decision:

In the first place, until the timber was cut, it could not be "goods", even though the contract was a sale of goods by virtue of s.62(1). Accordingly, until that point in time property could not pass to the buyer. See also Philip Head & Sons Ltd. v. Showfronts Ltd. [1970] 1 Lloyd's Rep.140.

⁶ The Sale of Goods Act, s.20, states: "*Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.*"

⁷ See Hayman v. M'Lintock 1907 S.C.936; Laurie & Morewood v. Dudin & Sons [1926] 1 K.B.223.

⁸ Per ATKIN, L.J. in Re Wait [1927] 1 Ch.606, p.630.

In Underwood Ltd. v. Burgh Castle Brick and Cement Syndicate,⁹

the seller agreed to sell to the buyer a machine weighing 30 tons that was bolted to and embedded in a concrete floor. Under the terms of the contract the seller was to dismantle the machine and to place it free on rail in London. While the machine was being loaded on a railway truck it was damaged. The seller was entitled to sue for the price only if the property had already passed before the damage happened. BANKES, L.J., with whom ATKIN, L.J. agreed, held that because of the risk and expense involved in dismantling and moving the engine the proper inference to be drawn was that property was not to pass until the engine was safely placed on rail in London and the seller, therefore, was not entitled to sue for the price. Under the Law, also, where the handing over of the goods is delayed owing to the breach of an obligation by the buyer, the risk passes to the buyer as from the last date when the handing over could have been made in accordance with the contract:¹⁰ which means that to apply this rule against the buyer it is not sufficient that he (the buyer) caused the delay but he must have been in breach of an obligation. In the case of Articles 26-28 of the Law when delivery is delayed (at the date fixed), the results are different according as to whether the risk has passed, and depend on whether the delay in delivery amounts to a fundamental breach (we will deal with the meaning of this term in the third chapter), and then the risk passes only if and when the buyer waives his right to avoid the contract. On the contrary, if the delivery does not amount to a fundamental breach the risk passes on the time of the delivery.

⁹ [1922] 1 K.B.343; [1921] All E.R. Rep.515.

¹⁰ ULIS Art.9~~8~~ para.1.

In the case of an antecedent delivery (Article 29) the problems of the time when the risk passes had been discussed widely in the Conference and the rule finally adopted was that the risk passes with the goods unless the buyer states that he will not accept the risk until the contractual date. Moreover, the Law defines the time when the risk passes in the case of a sale of goods in transit by sea.¹¹ According to the relevant rules of the Law, the risk passes to the buyer at the time of delivery, which shall be effected by handing over the goods to the carrier for transmission. If the transit involves more than one transmission the time is of the delivery to the first carrier. Under the Uniform Commercial Code,¹² the risk passes on delivery of the goods. This is similar to the rule of the Law and different from the Sale of Goods Act, 1893. In the export trade law, contrary to the rule of the s. 20 of the Sale of Goods Act, the two concepts of the passing of the risk and the transfer of property are separated, and special arrangements are made by the parties and if they are not the risk will pass when the goods leave the custody of the seller.¹³

There are some difficulties also, in defining who the other persons are for whose conduct the seller is responsible, and the consequences of any lack of conformity occurring after the time fixed, according to the provisions of Article 35 of the Law. This is a matter of fact; it needs to be decided by the courts on the particular circumstances, and may prove to be a difficult task. In this case it is fairly clear that the answer must be extracted from Article 9, and

¹¹ ULIS Art.99 par.1, in combination with Art.19 par.2.

¹² UCC. s.2-506.

¹³ See, President of India v. Metcalfe Shipping Co. [1969] 2 Q.B.123; affd. by C.A. in [1970] 1 Q.B.289.

if usages and established practices do not supply the answer, the latter may have to be taken, from the "general principles" referred to in Article 17, or have to be supplied by the municipal legal system which is the proper law of the contract.¹⁴

The problem as to the time of the fitness of the goods appears, also, another complexity: this is whether the condition of the goods must continue to remain reasonably fit for their particular purpose for a reasonable period after delivery. The answer to this question must be taken from the expression "*lack of conformity occurring after the time fixed . . . was due to an act of the seller or of a person for whose conduct he is responsible*",¹⁵ in combination with the wide meaning of Article 36 (this will be examined in the following pages), which, in fact, regulates the case of latent defects of the goods when the buyer did not know of them when the contract was concluded. On the other hand this problem seems to be a matter of fact, in some instances, and must be solved by the courts. Indeed, in some circumstances we can say that the goods would not be reasonably fit for the purpose if they became defective within a short time, after delivery, especially when the goods have latent defects which may only be discovered by use. An illustrative example of the English judicial practice on this matter is the case of Preist v. Last,¹⁶ where a hot-water bottle was purchased which burst, causing injury to the purchaser's wife. It was held that there was a breach of the implied conditions of the contract, although this article was examined at the time of the conclusion of the contract and the risk

¹⁴ See, R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.107.

¹⁵ ULIS Art.35 par.2.

¹⁶ [1903] 2 K.B.148.

had passed to the buyer, and the burst happened after five days' use.¹⁷ But the defects in the goods must exist (even if latent) at the day of the conclusion of the contract and, also, the buyer loses his right to reject the contract on the ground of defects in the goods sold in a case where the possibility of interference or tampering, after the passing of the risk (delivery of the goods to the buyer) by third parties cannot be excluded.¹⁸ The buyer, also, is not covered for defects arising from mismanagement, or misuse, or an alteration of the nature and quality of the goods in a manner not contemplated by the parties,¹⁹ and the goods do not need to be the best on the market or to be perfectly adapted to their intended use to comply with the condition.²⁰

A LIMITATION TO THE BUYER'S RIGHTS

As we have seen the Law in Article 33 defines the seller's basic obligation dealing with the conformity of the goods in a rather clear way, laying down a list of conditions, in respect of which a lack of conformity can occur. However, the Law in order to fulfil this general rule of its large subject uses a simple but compact framework,¹ adding in the second paragraph of the foresaid Article, an important provision that:

¹⁷ See also, Godley v. Perry [1960] 1 All E.R.36; [1960] 1 W.L.R.9.

¹⁸ See Phillips v. Chrysler Corpn. of Canada Ltd. & Roxburn Motors Ltd., [1962] 32 D.L.R. (2d) 347.

¹⁹ Johnstone & Wilmot Pty. Ltd. v. Kaine (1928) 23 Tas. L.R.43, 59; Decca Radar Ltd. v. Caserite Ltd. [1961] 2 Lloyd's Re.301.

²⁰ See further K.C.T. SUTTON, *supra*, pp.121-122.

¹ In Prof. HONNOLD'S appropriate expression: "*These few words provide a basis for a unified, powerful and realistic approach to a solution of the most pervasive problem of sales law*" ("*A Uniform Law for International Sales*", in UNIVERSITY OF PENNSYLVANIA LAW REVIEW, vol.107 (1959), pp.314-15).

"No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material." ²

Thus, the Law establishes a limitation on the rights of rejection for immaterial deviations from the contract and accepts on this matter that the defects will be material on the *de minimis non curat lex* principle. This approach of the Law seems to be more practical and effective in business practice. On the contrary this approach is unfamiliar in the English Law practice, where the buyer has always the right to reject all the goods if he chooses, even though the deviation of the contract is so slight that the buyer could easily remedy the defects,³ provided that he acts in time.⁴ The right to reject goods as not being in conformity with the contract is greater in Scotland than it is in England. In Scotland a buyer may reject goods which he has accepted if he does so "timeously", whereas in England he could only do so if the contract contained what the continental lawyers call a "resolutive condition".⁵

² The relevant Art.40(2) of the Draft of 1956 was different adding that: ". . . where it is not material to the interests of the buyer or where it is permitted by usage". But this had reformed on the basis that its articulation was excessively detailed and its meaning "is substantially, included by implication in the Law under Arts. 9 and 17" (See R. GRAVESON, E. COHN, D. GRAVESON, "Uniform Laws on International Sales Act 1967", p.73).

³ See *Arcos, Ltd. v. E.A. Ronaasen & Son* [1933] A.C.470; but compare it with *Shipton, Anderson & Co. v. Weil Brothers & Co.* [1912] 1 K.B.574,577.

⁴ *Rapalli v. Take Ltd.* [1958] 2 Ll.R.469, C.A.

⁵ See M. MARK, *Chalmer's Sale of Goods*, 17th ed., p.203 (with the relevant footnote). It is to be noted, however, the significant observations of Lord AVONSIDE, in a recent case, *Millars of Falkirk Ltd. v. Robert Turpie* (15th January, 1976 First Division, unreported), where the latter (Appellant) rejected a car which he had bought from the dealers (Respondents), on the ground that the car shortly after its delivery to him had a defect which led to a leakage of hydraulic oil from the valve assembly mechanism of the power assisted steering assembly. Lord AVONSIDE stated:

"Under the first part of section 11 (2) of the Sale of Goods Act, 1893 failure by a seller to perform any material part of a contract of Sale is a breach of contract which entitles the buyer within a (cont.)

The definition, also, which is contained in Article 34 of the Law creates a limitation on the buyer's rights relating to the lack of conformity based on the Article's 33 rules. Article 34 states:

"In the cases to which Article 33 relates, the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods."

The wording "other remedies" in this case probably refers to solutions available to the buyer on recourse to theories of warranty against defects in the goods,⁶ although under the system of the Law the counterpart principle of warranty contained in the common law system, is that emanated from the rule of Article 82 of the Law, which provides that in a non-fundamental breach of contract the buyer can recover damages. This rule, also, excludes remedies available under local laws based on mistakes as to the substance of the goods.

⁵ (cont.)

reasonable time after delivery to reject the goods and treat the contract as repudiated."

And he continued:

"There was undisputed evidence of the fact that new cars may have 'teething troubles' and to an extent that is recognised by the manufacturers' guarantees, relating to repairs in the early life of a car. Unfortunately this is so well known as to be almost within judicial knowledge."

And finally he observed:

"The car was 'reasonably fit' for the purpose because the defect complained of was trifling (the emphasis is mine) and could easily be remedied before any situation of danger could arise."

Hence, it is obvious that the foresaid principle of the Law has started to be adopted by the British courts.

⁶ But See, Prof. A. TUNC, "Commentary" in RECORDS AND DOCUMENTS OF THE CONFERENCE, Vol. I, p.374.

The above mentioned provision is not applicable in the case when the seller would be found guilty of fraud relating to the contract. It is of interest to note that the Law without using the terms "condition" and "warranty", which are very common in the Sale of Goods Act, distinguishes between the two sorts of breach: those which can lead a contract to be avoided, and they are called fundamental breaches defined by Article 10 of the Law (this subject will be examined in a subsequent chapter of this thesis), and those under which only damages can be claimed.⁷ Further the Law, contrary to the definition of Article 35, provides that the seller will not be liable for the consequences of any lack of conformity of the kind referred to in sub-paragraphs (d), (e) and (f) of paragraph 1 of Article 33,

"If at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity".^{7a}

The expression "knew, or could not have been unaware" is similar to the expressions which appear in Articles 10, 40, 53, 76, 82, 99 and 100 of the Law and as an interpretive rule for all these there is used the definition of Article 13, which provides: *"a party knew or ought to have known"*. Further this Article, in order to give a wider meaning in similar expressions of the Law adds: *"or any similar expression"*.⁸

⁷ There is no counterpart distinction under the English system of law, but the development of the doctrine of the fundamental breach, or breach of fundamental terms, is connected with the problem of exemption clauses (see, Smeaton Hanscomb & Co. Ltd. v. Sassoon I. Setty, Son & Co. [1953] 2 All E.R.1471; Karsales (Harrow) Ltd. v. Wallis [1956] 2 All E.R.866).

^{7a} ULIS Art.36.

⁸ See the contrary attitude of R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.59, who observe that the foregoing expressions *"are not defined in the Law but Article 13 applies mutatis mutandis."*

*Ref'd
definition*

This provision relates to ignorance based on gross negligence (*culpa lata*) or professional incompetence and its effects are that the seller in case of defects of the goods will not be responsible if the buyer either had actual knowledge of any lack of conformity, or where no reasonable man would have passed such lack unnoticed.

The same expression appears in Article 40, while the corresponding expressions in Articles 38 and 39 are read "*Knew or ought to have known*", and "*. . . discovered . . . or ought to have discovered*", respectively.⁹ The general intention of this rule seems to relieve the seller of his liability and deprive the buyer of his remedies, only in extreme instances of gross negligence (*culpa lata*) on the part of the buyer of not discovering lack of conformity. Hence, the Law adopting this approach in the present problem appears to be aware of the principle *caveat emptor* and, according to Prof. HONNOLD'S remarks:¹⁰

"The present draft, in enforcing certain express obligations and excluding implied obligations, could be interpreted as establishing an international rule of caveat emptor, at least where no national legislation applies."

This means that the seller is under no duty, to some extent, to disclose defects, while the buyer must use his own eyes to discover them. But this principle does not relieve the seller if he made a statement to the buyer in the course of negotiations leading to the contract of sale, which is known in the common law system as misrepresentation.¹¹ The

⁹ In the original draft the phrase "ought to have known" was applied everywhere, but the authors of the Draft decided to change this point and in these two articles adopted the phrase: "*could not have been unaware*", which is narrower than the first and does not cover the ignorance based on ordinary negligence (*culpa levis*).

¹⁰ J. HONNOLD, *supra*, p.315.

¹¹ s.2(1) of the Misrepresentation Act, 1967, (which is not applicable in Scotland).

relevant time, again, is the time of the conclusion of the contract,¹² which is generally taken as the time of the communication of the parties as regards the matter of the offer and acceptance,¹³ but the rule covers latent defects if the buyer was not aware of them when the contract was concluded, because the seller in this case is obliged to guarantee that the goods are not subject to latent defects. There is a similarity between the rule of Article 36 of the Law and that which is contained in s. 14 ⁽²⁾ ~~sub paragraph 2~~ of the Sale of Goods Act, 1893 which provides:

" . . . The goods supplied under the contract are of merchantable quality, except that there is no such condition -

(a) as regards defects specifically drawn to the buyer's attention before the contract is made . . . "

It is apparent from this expression that there is no condition of merchantable quality relating to defects specifically drawn to the buyer's attention before the contract is made. Similarly, it would not be reasonable for the buyer to expect the goods to comply with special requirements in a case, for instance, where the goods were intended for export, of local foreign law, unless the seller knew the legal requirements of the country to which the goods were being exported, as well as the intention of the transaction. The corresponding provision of the Sale of Goods Act, 1893 before the amendments of 1973 was different.¹⁴ This approach has been adopted by the most national legislations belonging to both the Roman law system and the Common law family. Indeed, this seems to be reasonable as safeguarding a fair balance between the parties' rights and obligations because

¹²ULIS Art.36.

¹³ Uniform Law on Formation Arts. 6 and 12, in combination with Art. 9 of Uniform Law on Sales which refers to the usages.

¹⁴ See Sumner Permain and Co. v. Webb and Co. [1922] 1 K.B.55.

*"It might . . . be as wrong to permit the buyer to hold the seller responsible without any escape as it would be to allow the seller to evade all responsibility."*¹⁵

This concept has its distant source in the law of Justinian under which the seller was held impliedly to warrant the thing sold free from serious defects existing at the time of the contract independently of his knowledge of the defects or not, but he was not liable for any patent defects which were known to the buyer or were so obvious that the buyer ought to have known them.¹⁶ This rule has been preserved without any substantial alteration in both the French and German Civil Codes as well as in the legal systems belonging to these two big families of the civil law world.¹⁷

Finally, it must be mentioned as regards the meaning of the rule of Article 36 of the Law, that the right of the relief of the seller refers only to the sub-paragraphs (d), (e) and (f) of Article 33, namely,

- (i) for defects of *"goods which do not possess the qualities necessary for their ordinary or commercial use"*;
- (ii) for *"goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract"*; and
- (iii) *"in general", for "goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract",*

respectively, according to the meaning of Article 36. The exemption does not refer to the quantity of the goods. Also, it does not refer to the case of goods not corresponding to the kind contemplated by the contract, nor to that of transaction by sample or model. As to the latter case, it must be remarked that there is a special proviso which has an essential somewhat similar to that of Article 35. It provides that the seller will be responsible for defects as to the sample or model

¹⁵ G.H.L. FRIDMAN, in *"Aspects of Comparative Commercial Law"* ed. by J. Ziegel and W. Foster, p.34.

¹⁶ See ZULUETA, *The Roman Law of Sale*, p.46.

¹⁷ Under the Greek Civil Code, Art.515, for instance, the ~~seller~~ is not
(cont.)

"unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith."

It is supposed here (and the text must be read as such) that the buyer accepted it (the sample or the model) without any reservation or protest.¹⁸ This, manifestly, lies to the other side of the concept of the American Uniform Commercial Code which provides that even statements made during negotiations relating to the goods will be created express warranties forming part of the contract. Likewise a description given, sample or model shown, will be an express warranty to the effect that the goods conform to that sample or model, notwithstanding that the seller has not used any formal words or had a specific intention to make a warranty.¹⁹

Finally, the last Article of the part of the Law under examination which refers, as we have seen, to "lack of conformity", is Article 37, which gives the seller the chance to remedy or complete any defects in his performance, or deliver other goods which are in conformity with the contract, in cases where the handing over of the goods has occurred before the due date fixed for delivery. The rule relates to both kinds of defects, the quantity and quality, and a presupposition of its operation is that (a) the handing over of the goods has occurred before the due date fixed for delivery, and (b) the buyer is not seriously inconvenienced or put to serious expense.

¹⁷ (cont.)

responsible for the legal defects of the goods, at the time of the transaction, if the buyer knew these defects. But for the existence of a mortgage, pre-note, seizure or pawn on the goods the seller is obliged even though the buyer knew their existence. (The meaning of legal defects here is either any right of a third party on the goods sold or defects of possession or right.)

¹⁸ There is a different theoretical approach between the two unities of the rules contained in Art.33(1), namely, those of sub-para.(a) to (d) which refer to objective lacks of conformity and those of sub-para. (e) and (f) which refer to more objective ones. However, each of them, in accordance with Art.43, may justify avoidance of contract if it amounts to a fundamental breach, as Prof. TUNC observed in the discussions of the Conference, (See, "Unification of the Law governing the International Sales of Goods", edited by J. HONNOLD, p.377).

¹⁹ (cont.)

Similar to the present provision of the Law is the rule of Article ~~44~~ (1) which, ~~which~~ refers to the case of ^{late} ~~present~~ delivery of the goods. The Special Commission of the Draft faced the difficult problem of anticipatory delivery by recognising the possibility of later mutual assent by the parties, and specifically giving this chance to the ~~seller~~, and they decided to solve this problem by redrafting ~~the relevant~~ Article ~~37~~. This problem is one of special difficulty because the exercise of the seller's recognising right must not cause the buyer either unreasonable inconvenience or unreasonable expense.

¹⁹ U.C.C. s. 2-313; see further A. SZAKATS, in Int. & Co. Law Quart., vol. 15 (1968), p. 758.

CHAPTER TWO

ASCERTAINMENT AND NOTIFICATION

OF LACK OF CONFORMITY

CHAPTER TWO

A S C E R T A I N M E N T A N D N O T I F I C A T I O N
O F L A C K O F C O N F O R M I T Y

GENERAL OBSERVATIONS

In order to give effect to the provisions (which have already been examined in the first chapter of the present study), relating to the conformity of the goods, the Law lays down the relevant rules implementing the proceedings in which any lack of conformity has to be discovered by the buyer and notified to the seller. It devotes the following three Articles¹ to the examination of the present subject, leaving a useful instrument in the hands of the buyer who could not be obliged to accept the goods unless he has been given a reasonable opportunity of examining the goods beforehand, for the purpose of ascertaining whether they are in conformity with the contract or not. In form, however, the above-mentioned rules seem to establish an obligation on the buyer's part regarding the present subject, since the text of the Law states: "*The buyer shall examine the goods, or cause them to be examined, promptly.*"² Indeed, the buyer, according to this expression, is under a duty to examine the goods, following certain proceedings in doing so, i.e. promptly. The meaning of the expression "promptly" is given by the interpretative rule of Article 11 which provides:

"Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed."

¹ ULIS Arts.38-40.

² Ibid. Art.38(1); (emphasis added).

In order to specify the time for action the Law uses this term which indicates that such an act must be done by the responsible party, i.e. the buyer, in such a way as is reasonable and possible for him, as rapidly as possible, according to circumstances. The Law, also, uses another milder expression relating to the time which appears elsewhere in the Law,³ and provides: "*Within a reasonable time*".

Where the goods are transported the buyer has to examine them at the place of their destination.⁴ Where the buyer re-despatches the goods without trans-shipment, and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of re-despatch, the examination may be deferred until the goods arrive at their new destination.⁵ The adopted solution as regards the method of examination is through mutual agreement of the parties, or, excluding this, by the Law or usage practised at the place of examination.⁶

After having examined the goods the buyer is bound to give the seller notice "promptly" if he has discovered or ought to have discovered any lack of conformity, otherwise he shall lose the right to rely on such lack of conformity. If a latent defect, which could not have been discovered by a reasonable examination, is found later, the buyer can rely on that defect provided that he gives the seller notice immediately after he has discovered it. Further, the Law defines the period of time in which the defects of the goods can be recovered. This period cannot

³ Ibid. Arts.42(2), 52(1).

⁴ Ibid. Art.38(2).

⁵ ULIS Art.38(3).

⁶ Ibid. Art.38(4).

extend longer than two years after the buyer has discovered the lack of conformity, unless this constitutes a breach of guarantee covering a longer period.⁷

When the buyer gives notice of any defect he is, also, under an obligation to specify the nature of such a defect and to invite the seller to examine the goods.⁸ In failing to do so the buyer loses his right to rely on the lack of conformity; but the buyer can rely on any defect announced to the seller, when he uses a notification or other communication, sending letters, telegrams or other appropriate means to this purpose promptly, irrespective of the delay or non-arrival of such a notice at its destination.⁹

Finally, the Law puts a limit on the seller's rights by the provision of Article 40, stating that:

"The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose."

The following pages will be devoted to the examination of the foregoing conditions in detail.

EXAMINATION OF THE GOODS

The fact that the goods have to be examined by the buyer constitutes an obligation on him to do so and, as we have already seen,

⁷ Ibid. Art.39(1).

⁸ Ibid. Art.39(2).

⁹ Ibid. Art.39(3).

the Law uses a specific expression in order to define the function of this duty of the buyer, namely, that the buyer is obliged to act under the force of its limitation rules. Of course, a presupposition that these conditions of the Law will be applied is that the parties have not excluded the application of these rules in their contract in whole or in part by express provision or by implication.¹ The parties can alter the limitation of the rules referring to this matter by incorporating different rules into their contract or by referring to the applicable rules of a municipal law; but in a case of international sale of goods where no such exclusion is contained in the contract and the ULIS is found to be the law governing this contract, a tribunal in any national law system is expected to apply the limitation rules of the Uniform Law.

It has already been mentioned that by non-examination of the goods and by not giving notice to the seller without undue delay the buyer shall lose the right to rely on any lack of conformity in the goods. The rules included in Article 39 of the Law must be read in conjunction with those contained in Article 49. This Article establishes another limitation on the buyer's part to act before the expiration of one year after giving a notice to the seller as provided in Article 39, with the exception of fraud on the part of the seller. The provisions of both Articles appear to apply only to actions by the buyer for lack of conformity as they are laid down by Article 33 of the Law, and no other claims of the buyer are remedied.

¹ ULIS Art.3.

The formulation of the rule which refers to the examination of the goods in the Law seems to be more realistic when it is compared with the relevant rules in other legal systems.² The fact that this provision imposes an obligation on the buyer's part to act as quickly as possible and give the seller notice,³ appears to be necessary and corresponds to the seller's need to be aware of the condition of the goods handed over and of their rejection in order to be able to take the required steps immediately to reship the goods or to resell them so avoiding deterioration or unnecessary expense.⁴

² The approach of the relevant rule of the Sale of Goods Act, 1893, s.34, provides different conditions: the obligation lies on the seller's side to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether or not they are in conformity with the contract. Section 15(2) of the Act gives the buyer a reasonable opportunity of comparing the bulk with any sample.

³ Cf. UCC: s.2-607(3) (a), which gives a definition of the requirements for notification of breach within a certain time stating that: "*the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.*" UCC: s.1-204(2) in defining the meaning of the term "reasonable time" provides: "*What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.*"

⁴ See Prof. J. HONNOLD, "The Uniform Law for the International Sale of Goods: The Hague Convention of 1964", in LAW AND CONTEMPORARY PROBLEMS, vol.30 (1965) pp.346-347. Under the Sale of Goods Act, 1893, s.34(2), although the examination of the goods appears in a different form from that of the Law rules, as we have seen, nevertheless the buyer will be held to have accepted the goods if he intimates to the seller that he has accepted them, or when he retains the goods for more than a reasonable time without telling the seller that he has rejected them, as s.35 of the Act provides. This provision seems to be in a sense similar to the Law's relevant provisions. An illustrative example of this approach is found in *Hardy & Co. v. Hillerns and Fowler* [1923] 2 K.B.490; [1923] All E.R. Rep.275, where the Court of Appeal held that if goods have been delivered to the buyer and he resells them and actually dispatches all or part of them to the sub-buyer, that was an act "*inconsistent with the ownership of the seller*" and the buyer was deemed to have accepted the goods under s.35 of the Act even though he had not had a reasonable opportunity of examining them to see if they were in conformity with the contract. This attitude was based on the ground that s.34 of the Act did not limit the general and independent character of s.35. Nevertheless, the above decision was reversed later, and the Misrepresentation Act, 1967, s.4, provides, first that s.34 shall take precedence over s.35; secondly, that in the case of specific goods the right to reject for breach of condition shall depend not on the passing of property but solely on acceptance by the buyer.

Various questions arise and call for discussion in connection with the problem of the examination as, for instance, the question of the place of inspection, the method of examination, the problem of perishing or deterioration of the goods handed over before such an examination had taken place, irrespective of the possibility of inspection being afforded to the buyer, and other similar questions. To some of the above problems the Law gives an answer in the foregoing rules of Articles 38 and 39, but others require elaboration. It is true that the Law imposes a far greater burden on the buyer than the common law or other legal systems do, formulating the idea of the examination of the goods as a duty of the purchaser, similar in articulation to the buyer's duty to pay the price;⁵ but for an examination of the goods by the buyer the collaboration of the seller seems to be of great importance. For instance, the proper packing of the goods and the physical condition of them, the place and the time where the examination will take place and other relevant facts, need preparatory acts or co-operation on the seller's part. All the above mentioned problems seem to have a solution in the Sale of Goods Act, 1893 as amended by the Supply of Goods (Implied Terms) Act, 1973, which puts a burden on the seller to give the buyer "a reasonable opportunity of examining the goods",⁶ and whether actually such an opportunity is afforded to the buyer, in order to implement his right of inspection properly, will be a question of fact in a case of an international sale contract. If the Law is found to be the

⁵ Cf. Arts.38(1) and 56 of ULIS.

⁶ s.34(2) of the Sale of Goods Act, 1893, (emphasis added). See *Lorymer v. Smith* (1822) 1 B. & C. 1, example cited by J.K. MACLEOD, *Sale and Hire Purchase*, p.109-110, where he observes that the statutory formula "reasonable opportunity" must mean "at a reasonable time and place".

proper law of such a contract the above subject will be governed by its rules dealing with the methods of examination. The nature of examination will depend on the nature of the commodities and will be governed by the agreement of the parties, trade usage and the circumstances which in some cases may include an analysis of several of the articles sold.⁷ Also, the matter of examination is not unrelated to the problems of delivery and passing of the risk. A question of law which arises in this connection is the question of what will happen if the goods deteriorated or perished before the buyer had been able to examine them? The answer to this question appears to be connected with the definition of the time when the contract is concluded, and this fact is taken as being of great importance in the Law. As we have seen,^{7a} the time of the conclusion of the contract is not precisely defined in the Law, but it is suggested that the contract is generally concluded by the communication of the acceptance.⁸ On the other hand, under the rule of Article 97(1) of the ULIS "*The risk shall pass to the buyer when delivery of the goods is effected . . .*". According to the rules of Articles 20-23 which deal with the time and place of delivery of the goods, the time of the passing of the risk coincides with that of the delivery of the goods.^{8a} Therefore, if the goods deteriorated or perished before the buyer had been able to inspect them he will escape liability for the price. This approach emanates if the above mentioned rules will be interpreted in conjunction with another rule of the Law, which provides that the buyer:

⁷ See Walter Potts and Co. Ltd. v. Brown, McFarlane and Co. Ltd. (1924) 30 Com. Cas. 64, 73.

^{7a} See, *supra*, p.15, 16.

⁸ Arts. 6 and 12 of ULFIS. (See R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.66.)

^{8a} Under the Laws of England, the United States of America, France, Belgium, Italy and Portugal the property in the goods sold passes when the parties intend it to pass, whether the delivery of the goods did or did not take place; while under the Laws of the Netherlands, Spain, Germany, the (cont.)

*"shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it."*⁹

If, therefore, the buyer had not the possibility to inspect the goods the Law does not put on him such a burden of responsibility in the case where the goods handed over had perished or deteriorated before the examination. Further, the Law, in its Articles 71 and 72, which refer to the provisions common to both parties' obligations, gives the solution just mentioned in a rather clear way. Article 71 in its second paragraph provides explicitly that:

". . . the buyer shall not be obliged to pay the price until he has had an opportunity to examine the goods."

Difficulties can appear, of course, in the interpretation of the rule relating to the time within which the buyer "ought to have discovered"

^{8a} (cont.)

Argentine, Brazil, Chile and Columbia the property passes, as a rule, only if the intention of the parties that it should pass is supported by the actual delivery of the goods. (See further, C. SCHMITTHOFF, "The Export Trade", 6th ed., p.66.)

⁹ ULIS Art.39(1), (emphasis added). While in English law a buyer who wishes to reject the goods which do not correspond with the requirements of the contract has to inform the seller of his intention within a "reasonable time" (s.35 of the Sale of Goods Act), in Swiss and Scandinavian laws the defects have to be notified to the seller "at once"; in German and Greek laws "without delay"; in Italian law, in principle, within eight days; in Spanish law, as regards packed goods, within four days and as regards hidden defects within 30 days; and in French law the buyer has to start proceedings "within a short time" (dans un bref délai). Under the Convention on the Limitation Period in the International Sale of Goods, signed in New York, June 14, 1974, and sponsored by UNCITRAL (United Nations Commission on International Trade Law), the limitation period in respect of a claim arising from a defect or lack of conformity of goods in an international sale contract shall, in principle, be four years. It is obvious from the foregoing observations that the provisions of the Law relating to the matter in question are, to a certain extent, in line with those of most of the Continental law systems, while it is manifest that there is a wide gulf between them and the common law approach.

the defect.¹⁰ The ULIS giving the definition as to the time and place of the examination provides in Article 38(2) that:

"In the case of carriage of the goods the buyer shall examine them at the place of destination."

This definition must be given in relation to other facts, namely, the nature of the goods, the means of their packing, the place where they are kept and the like. The interpretation of this term must be given in a wider context in order to fit the complex reality of commercial practice, and must be understood as being what is reasonable for the buyer to carry out a satisfactory examination. The draftsmen of the Uniform Law having all the difficulties mentioned in mind gave a rather wide meaning to the term "destination". Therefore, the rule of Article 38(3) of the text justifies a delay in the examination (if the goods are redespached), until arrival at their new destination. But in this case the Law restricts the scope of this relaxation, providing that such a new destination is only accepted if

"the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redespach . . ."

On the other hand, the Law, using the rather vague term "possibility" in this case, creates difficulties in the application of this provision, and the test of the objective reasonable man would probably be employed according to the circumstances of the case. This approach seems to have been adopted, to a certain extent, by the English courts but it is wider in spirit than that of the Law. In Saunt v. Belcher and Gibbons

¹⁰ ULIS Art.39(1)

Ltd.,¹¹ BAILHACHE, J., explaining the adoption of the above approach, observed:

"In order to postpone the place of inspection, it is necessary that there should be two elements: the original vendor must know, either because he is told or by necessary inference, that the goods are going further on, and the place at which he delivers must either be unsuitable in itself or the nature of packing of the goods must make inspection at the place unreasonable."^{11a}

Such an approach has been adopted by the common law courts, particularly in cases where the defects were latent and not discoverable on delivery or in cases where the possibility for a proper examination¹² by the buyer was probably unobtainable because this right given to the buyer is always given with sales of unascertained goods in mind. The definition of the reasonable time as to inspection, in the spirit of the Sale of Goods Act, is wide, in order to be adopted by the tribunal according to the facts of the particular case rather than in special regulations; but the conduct of the buyer must be taken into account if he had acted inconsistently with the ownership of the seller.¹³

¹¹ [1920] All E.R. Rep.142; (1920), 26 Com. Cas.115.

^{11a} (1920), 26 Com. Cas., p.119.

¹² See, B. and P. Wholesale Distributors v. Marko Ltd. [1953] C.L.Y.3266.

¹³ s.35 of the Sale of Goods Act, 1893. See, Farrow's Falcon Press Pty. Ltd. v. Quarrill, [1915] V.L.R.651, where the Court held that the fact that the buyer had accepted and resold part of the goods constituted a conduct by him inconsistent with the right of rejection, although in other cases it had been held that a mere resale prior to delivery would not be an acceptance but needs to be followed by delivery to a sub-purchaser, (see Hammer and Barrow v. Coca-Cola [1962] N.Z.L.R.723; see also, A.J. Frank & Sons Ltd. v. Northern Peat Co. Ltd. (1963), 39 D.L.R. (2d) 721, 725, where the Ontario Court of Appeal took the view that the giving of instructions by the buyer to the seller to send the goods direct to the sub-purchaser, did not amount to acceptance because the goods were in the buyer's possession at the time they were rejected and he was therefore in a position to hand them over to the seller at the moment of rejection).

At this point the Uniform Law, according to Prof. HONNOLD'S viewpoint,¹⁴

"makes the common error of laying down detailed rules that fail to fit the complex facts of commercial life".

The disadvantages of the strict limits as to the time on the buyer's right for the rejection of defective goods, seem to be moderated in the Law by the provision referring to latent defects, a subject to which the following pages will be devoted.

LATENT DEFECTS

Article 39 (1) gives relief to the buyer in regard of his duty to examine the goods "promptly", as has been mentioned above, stating that:

"If a defect which could not have been revealed by the examination of the goods provided for in Article 38 is found later, the buyer may nonetheless rely on that defect, provided that he gives the seller notice thereof promptly after its discovery."

Further, in order to define the term "promptly" the text continues:

*"In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he had not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of guarantee covering a longer period."*¹

It is obvious from the rule just quoted that a possibility is afforded to the buyer to be covered for latent defects which a previous examination failed to reveal, provided that the buyer exercises this right promptly

¹⁴ J. HONNOLD, *supra*, p.347.

¹ ULIS Art.39(1).

within two years' limit. In adopting this approach the Law tries to balance the rights of the buyer and seller and includes in this category a number of exceptional cases which must be treated differently from the normal way, provided that the goods are in such a condition or the type of faults are such that an examination in the ordinary way would be unlikely to reveal them. This category comprises such cases as where it might not be possible for the buyer to be aware of those defects before the goods are put in use, or without destroying their utility for the consumer, as, for example, in sale of drugs, medicines, chemical substances or metals. The problem of the reasonable delay in examination must be viewed in relation to the article sold and the nature of the defects complained of. The wording of the text in regard to the subject under discussion,² corresponds to the expression: "*reasonable opportunity of examining the goods*" in the Sale of Goods Act.³ The apparent difference between the two relevant rules referring to the same problem is that the Uniform Law sets a limit as to the time within which the buyer has to discover any latent defects, and once he discovers them he is bound to give prompt notice to the seller to this purpose; otherwise the buyer loses the right to rely on a lack of conformity even though such a lack was of latent character. Whereas there is no defined restriction on this matter in the Sale of Goods Act under which, what would be a reasonable time will be a question of fact which varies according to the circumstances. This means that from the point of view of the Sale of Goods Act, to give an answer to this question some other elements are taken into consideration, as, for instance, whether the seller has been prejudiced by the delay if he lost an opportunity to resell the goods. The

² Ibid. Art.39(1)

³ s.34(2).

provision of the "reasonable opportunity" has been so drafted as to allow the buyer the opportunity to ensure that the goods answer to the requirements of the contract, to give the buyer a reasonable time of inspection and cover defects which in those circumstances such an examination would reveal, especially with the sales of unascertained goods in mind. But it is always prudent on the part of the buyer to examine the goods as early as practicable after their arrival at the place of the examination, whether that is the place of delivery, the place of final destination or another place.⁴ Notwithstanding, there are some cases, as has already been mentioned, where some sort of latent defects become discoverable only after a considerable time has elapsed and, therefore, only the user may be able to discover them. By adopting such an approach a legal system gives a protection to the buyer's right to reject the goods not conforming to the contractual expectations in regards of latent defects and prevents the seller relying upon earlier conduct of the buyer that would normally have constituted an acceptance of the goods.⁵ In Heilbutt v. Hickson,⁶ an old case in the English courts, the seller contracted to make and supply the buyer with 30,000 army shoes as per sample. It was agreed that the delivery of the shoes would be by weekly instalments to a wharf which was the contemplated place of examination of them, and the price was to be paid there. The seller was aware that the shoes were for delivery to the French army. However, it was impossible for the buyer to examine the shoes sufficiently to be able to discover what filling had been used in the shoes and whether,

⁴ See, Prof. C. SCHMITTHOFF, "The Export Trade", 6th ed., p.80.

⁵ See, Prof. D.W. GREIG, "Sale of Goods", p.145.

⁶ (1872), L.R.7 C.P.438.

therefore, they were suitable for the purpose for which they had been purchased. So the buyer, to be sure, took delivery on the strength of a written undertaking by the seller to take the shoes back if paper was discovered in them and the French army rejected them. Eventually the shoes were rejected by the French military authorities, because paper was discovered in a large quantity of them, and the buyer claimed to be entitled to return them to the seller. A majority of the Court of Common Pleas held that the seller's written undertaking varied the terms of the original contract and entitled the buyer to return the shoes to the seller. But BRETT, J., although he agreed with this conclusion, disagreed as to the basis of the decision, stating that even without the written undertaking the buyer would have been entitled to return the shoes. His opinion has been adopted by the courts on the basis that it relates the crucial question of what is a reasonable time within which the goods must be rejected to the nature of the defects. In BRETT'S, J. observations:

"By the necessary inefficacy of the inspection in London - an inefficacy caused by this kind of fault, viz. a secret defect of manufacture which the defendants' servants committed - the apparent inspection in London could be of no more practical effect than no inspection at all. If it could be ^{of} no practical effect, there could not . . . be any effective, and therefore, any real practical inspection until an inspection at Lille." ⁷

It has been noted that the Law imposes a duty of care in regard to the later discovery of faults which could not have been discovered at the time of the first examination. Hence, the Law requires from the buyer to take special care even after the first examination has been made at the time of delivery of the goods, to discover as soon as possible defects not discoverable and not recognisable at the time of this

⁷ (1872), L.R.7 C.P., pp.456-457.

examination. In the opposite case the buyer loses his right to rely on the defect. The Law by so providing deprives the buyer of remedies in respect of latent defects where a fault is latent and a considerable time elapses before this has been discovered; but this is, actually, the result of the effort made by the text to reconcile as much as possible the divergent interests of the parties in this situation and it seems to be reasonable for the reasons which have already been mentioned. In Leaf v. International Galleries,⁸ the buyer had purchased a picture, described as a Constable, in 1944. After five years, in 1949, he tried to sell it at Christie's and was informed that it was not by Constable. He sought rescission of the contract. The Court of Appeal rejected his claim even though he was in good faith having no idea at the time of the transaction and during all the five years that the picture was not genuine. The Court of Appeal correctly decided that the buyer's right to reject the article purchased had been lost after such a long period.

Another difficulty in the interpretation of a sale contract by the courts can be found in the defining of the exception relating to defects which should have come to light if the buyer had taken advantage of whatever opportunity of examining the goods had been made available to him, that is to say, had properly examined the goods. In considering this question the court has to take into account the surrounding facts to define those defects which such examination ought to reveal, and therefore the seller is to be freed from his liability for handing over defective goods, if the buyer showed gross negligence in making no proper

⁸ [1950] 2 K.B.86; [1950] 1 All E.R.693.

inspection, or the faults were of such character that the "apparent inspection . . . could be of no more practical effect than no inspection at all", as we have seen in the above quoted case of the English courts.⁹ In Thornett & Fehr v. Beers & Sons,¹⁰ the buyers' claim for defects, failed on the ground that they had brought themselves within the proviso. The parties had agreed that their agents should meet in the place where the goods were placed and they should be examined by the buyers' agents, and before entry into the contract, the buyers told the sellers that they had inspected the goods (barrels of vegetable glue), although in fact they had not done so, because they were pressed for time. Every facility was offered the buyers for inspection but none of the barrels had been opened by their representatives who had only a look outside of the barrels. On this basis BRAY, J. held in the sellers' favour on the ground that there was no condition of merchantability implied according to the circumstances, as the contract was only made after the examination had taken place. BRAY, J. pointed out:¹¹

"I do not think that the statute requires a full examination, because the words that follow show that the proviso deals with the case where the buyer has not made a full examination. Was there an examination? . . . Both parties intended a full examination . . . It may be a question whether, after this statement [that they had examined the glue], the [buyers] could be heard say that they had not examined the glue, but however that may be, I think they examined the goods within the meaning of the sub-section. There can be no doubt that such an examination if made in the ordinary way would have revealed the defects complained of."

⁹ (1872) L.R.7, C.P.438.

¹⁰ [1919] 1 K.B.486.

¹¹ [1919] 1 K.B., p.489. It has been suggested by "Chalmers Sale of Goods", 17th ed., pp.105-106, that in such a case the seller will not be liable for such defects, since the buyer's conduct shows that he was willing to take the risk of any defects not revealed by a partial inspection . . .

This problem seems to create difficulties in cases where a normal examination of the goods takes place and where the defects of the goods sold are such as an examination prescribed by the Law is not sufficient to discover; even though the Uniform Law eliminates these arguments by laying down a restrictive rule providing that:

*"The buyer shall lose the right to rely on a lack of conformity . . . he has discovered . . . or ought to have discovered it."*¹²

It is clear enough from this rule that the Law intends to deprive the buyer of his right, under the mentioned circumstances, to rely on those defects of the goods, which he ought to have discovered and to give the seller a relief from his liability where the buyer's loss is due to his own negligent examination. On the other hand, in case of latent defects, where the faults are of such kind as not to be discoverable by a reasonable inspection, the buyer can rely upon them, anyway, provided only that he exercises his right according to the provisions of the Law.¹³

The Uniform Law by giving this solution to the problem under examination seems by its restrictive rules to avoid a sort of vagueness existing in the relevant rules of the common law system, and permits the conclusion that under pain of losing his rights (a buyer) should take special care even after the examination required to discover as soon as possible any faults in the goods handed over. On the contrary, the Sale of Goods Act seems to be rather flexible in this case as regards the buyer's duty of examining the goods, affording him "a reasonable opportunity"¹⁴ for this purpose so putting an additional burden on the

¹² ULIS Art.39(1).

¹³ Ibid. Art.39.

¹⁴ s.34(1) of the Sale of Goods Act, 1893.

courts to define this term. In Frank v. Grosvenor Motor Auctions Pty. Ltd.,¹⁵ an Australian case, where a purchased motor car had a serious defect, although it had been examined by the buyer before the sale, the judge pointed out that there are two questions to be considered: Firstly, whether there was actually an examination, and secondly, whether the defects were such as ought to have been revealed. In his words:

*"In order to ascertain whether the proviso operated the magistrate should have considered first whether the buyer did in fact examine the car before he agreed to buy it, and then (if he - the magistrate - decided that the buyer had in fact examined the car before the sale) whether the defects which had been proved to exist were such that they ought to have been revealed to the buyer by the examination which he made."*¹⁶

Hence, the different approach to the problem in question by the Uniform Law is, as has been emphasised (that the further formalities of ascertaining and notifying the want of conformity) are imposed on the buyer. This point of the Law constitutes an important innovation in the text, whilst in the Rome Draft these breaches on the seller's part, since they were coupled with non-performance on the date or at the place agreed, did not require any ascertainment or notification.¹⁷ In the form of the present Law the buyer is deprived of his rights in relation to defective goods if he does not act in accordance with certain rules as regards this subject matter.

PLACE OF EXAMINATION

The place in which the goods sold have to be examined is related to the place of the delivery, and this is the agreed destination of the

¹⁵ [1960] V.R.607.

¹⁶ [1960] V.R., p.609.

¹⁷ RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.59.

goods. In sales governed by the Uniform Law, under normal circumstances, the aforementioned principle will be applied, but difficulty can appear when the buyer causes the goods to be redespached to another destination without transshipment, where it is difficult for him to inspect the goods on the spot. In this case the place of the inspection is transferred to the arrival of the goods at their new destination, but this will happen only if the seller knew or ought to have known at the time of the conclusion of the contract of the possibility of this redespatch.¹

The term "possibility" used by the Law appears to carry a sort of vagueness which will give rise for disputes in its interpretation by the courts, and the objective test of the reasonable man would apply, again. According to the observations of the Federal Government of Germany submitted to the Special Committee of the Conference,

*"the possibility of a re-despatch . . . arises in so very many cases that almost always when there has actually been a re-despatch it must be concluded that the seller knew or ought to have known of this possibility."*²

Generally speaking, the subject of the place as well as of the time of the examination of the goods brings a complexity of problems in its wake, because it lies in the middle of the two sides of the divergent interests of the parties; the Law in its intention to establish a solution sufficiently satisfactory for both parties lays down the above rule and defines as the place and time of inspection those of the new

¹ ULIS Art.38(3).

² See, RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.96, where the Federal Government of Germany suggested that it be stated to the relevant rule that: *"The seller, at the time of the conclusion of the contract, knew or ought to have known because of circumstances existing at that time that the goods would be the subject of a re-despatch without transshipment"*. Finally, the rule was articulated in its present form.

destination. Indeed from the standpoint of the buyer or subsequent purchasers, it would seem reasonable that examination should only be required at the new destination. On the contrary, from the seller's point of view this transfer carried the risk of seriously lengthening the period in which disputes might arise and in which deterioration of the goods might take place.³

It has been mentioned above, that the place of examination is *prima facie* the place of delivery, but the parties are free to put an agreement in their contract that another place will be the place of examination of the goods. If there is not an express agreement in the contract relating to the matter in question a number of other events intervening in the sale contract will be taken into account in order to find the real intention of the parties, as, for example, the fact that the contract of sale includes a re-sale and the seller is instructed to despatch the goods direct to the sub-buyer, where the place for inspection contemplated by the parties will be the premises of the sub-buyer; or in a case where the delivery was to be made at a wharf where an opportunity for inspection is not possible; or where the contract is related to a special package for despatch; and, strictly speaking, if a reasonable examination seems to be unattainable at the place of delivery, in these cases the suitable place of examination must be understood to be the place where an effective examination is first possible. These events will be helpful for the courts especially for defining the vagueness of the term "possibility", in order to give an interpretation to the

³ See, Prof. A. TUNC, "Commentary", in RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.I, p.375.

contract according to the intention of the parties. Nevertheless, the spirit of the Law is that the seller must be aware that such a re-despatch is going to take place, and the buyer bears the burden of the proof of such a fact. This approach corresponds to the requirements of the commercial law, so giving a kind of protection to the seller's interests concerning risk or deterioration of the goods sold. The common law courts have adopted this approach in the way in which it has been expressed by BAILHACHE, J. in Saunt v. Belcher and Gibbons Ltd.,⁴ but at the same time a number of other elements can arise in the contract which can create difficulties in its construction. In a New Zealand case, Hammer and Barrow v. Coca-Cola,⁵ the facts were that the plaintiff (the seller), in Christchurch, agreed to supply the defendant (the buyer) with 200,000 yo-yos to be used in an advertising campaign, which had to be delivered by instalments. Under the contract delivery was to be made at the plaintiff's factory door, but there was an agreement in the body of the original contract that the seller would arrange despatch of these goods direct to the sub-purchasers' premises in Auckland and elsewhere and the buyer had re-sold part of the goods before any deliveries had been made. Of the goods sent to the first sub-purchaser by the seller through a forwarding agent, 80 per cent were found defective, and the buyer on this ground rescinded the contract. The seller sued the buyer for damages for the breach of the contract. The argument was whether the defendant was entitled to reject the goods actually delivered to the sub-buyer at the place contemplated by the parties. The plaintiff alleged that there had been an acceptance of the goods by the re-sale and delivery to the sub-purchaser in Christchurch when the plaintiff handed over the goods to a forwarding agent for despatch and it was,

⁴ (1920) 26 Com. Cas.115; [1920] All E.R. Rep.142, (See supra, p.94).

⁵ [1962] N.Z.L.R.723.

therefore, too late for rejection. But RICHMOND, J. found that in the circumstances the place for the examination of the goods contemplated by the contract was the sub-purchaser's premises in Auckland and the fact that the goods had been despatched to Auckland by the buyer's agent was not an act of the buyer inconsistent with the seller's ownership. It was merely the carriage of the goods to the place contemplated for examination by the buyer and, therefore, the defendant was entitled to reject all the goods sent in Auckland except a certain quantity which had been sent on from there to various retailers or which had been treated by the buyer in an endeavour to correct their faults. It has been made quite clear by this case that for the common law courts the place of delivery is taken as the place of examination only if there is not any other agreement in the contract or if the circumstances do not lead to the contrary conclusion.

The requirement that the goods must be inspected at the place of their ultimate destination appears particularly in contracts constituted by correspondence, on the basis that the goods are to be delivered at a station for the buyer to collect and take them to his place of business; because of the methods of transshipment today it seems often impossible to inspect the goods at the time of transshipment. Such contracts are specially common in the field of international sales. In these cases the meaning of the term "destination" is to be interpreted in the wider context of where it is reasonable for the buyer to carry out a satisfactory examination.⁶ This approach was adopted by the New Zealand Court of Appeal, in an old New Zealand case, Canterbury Seed Co. Ltd. v. J.G. Ward Farmers' Association Ltd.,⁷ where the view was expressed:

⁶ See, D.W. GREIG, *supra*, p.140.

⁷ (1894), 13 N.Z.L.R. 96, p.108.

"Where . . . a merchant by correspondence orders goods from another at a distance, the purchaser has a right to inspect at the place which will be reasonably supposed to be in the minds of the parties [as] the destination of the goods . . . where the purchaser carries on business."

From what has been discussed in the preceding pages, it is understood that if there is not any term in the contract expressly stated or by implication drawn out from the circumstances to the contrary, there seems to be no obligation on the buyer to carry out an examination before the arrival of the goods at their ultimate destination, which could be the place where the buyer carries on business, or the sub-purchaser's premises. But the buyer's behaviour relating to the acceptance of the goods such as, removal of the goods from the place of the examination or other physical dealing with them, will be taken into consideration and may deprive the buyer of his right to reject the goods as defective. In E. & S. Ruben Ltd. v. Faire Brothers & Co. Ltd.,⁸ (where a sale of rubber material of specified length and width was purchased and the buyer, who had re-sold before placing his formal order with the seller, requested the seller to deliver direct to the sub-buyer at an agreed charge), when the sub-buyer rejected the goods as not up to the sample or description the buyer immediately gave notice of his own rejection. It was held that the buyer took delivery constructively at the seller's premises where the goods were appropriated to the contract, and held to the order of the buyer, and that thereafter the seller acted as the buyer's agent in despatching the goods to the sub-buyer. The act of despatch was, therefore, the act of the buyer and it occurred after delivery to the buyer, which was inconsistent with the ownership of the seller.

⁸ [1949] 1 K.B.254; [1949] 1 All E.R.215.

ADDITIONAL RELEVANT DUTIES OF THE BUYER

Further the Uniform Law imposes a number of other duties on the buyer relating to his basic obligation (which has been discussed above) to examine the goods. Hence, Article 39 paragraph 2 provides:

"In giving notice to the seller of any lack of conformity, the buyer shall specify its nature and invite the seller to examine the goods or to cause them to be examined by his agent."

We have seen that the Law requires the buyer, after he has discovered a defect by the examination of the goods, to give the seller notice as soon as possible (promptly). The present rule requires that the notice must be such as to specify the nature of the defect in the goods, and also in the same notice must be included an invitation to the seller or his representative to examine the goods in proper time. It is obvious from this provision that the buyer cannot rely on a notice not specifying the nature of the lack of conformity. The expression of the text: ". . . the buyer shall specify its nature",¹ imposes a duty on the buyer's part that when he sends a notice to the seller, warning him that the goods handed over do not correspond to the expected conformity, he (the buyer) must describe as precisely as possible the defects of the goods, in order that the seller may be able to replace the defective goods with others or to repair them (if possible). Thus, the buyer sending a relevant notice to the seller and describing the faults of the goods as is required by the Law, can rely on any fault notified but not on those which he has not described or not properly described, except in the case of latent defects as provided by Article 39, paragraph 1,

¹ ULIS Art.39(2).

sub-paragraph 2. There is not any corresponding provision of this rule in the Sale of Goods Act, where the approach adopted is that even acts which could amount to acceptance of the goods should not be held to be so until the buyer has had a reasonable opportunity of examining the goods, as contemplated by section 34 of the Act.² Nevertheless, a decision of the Court of Appeal, in Hardy and Co. v. Hillerns and Fowler,³ seems to be contrary to this approach. It was shown by this case that even though no examination had taken place and a reasonable time for this examination had not expired, the conduct of the buyer could amount to an acceptance of the goods, on the ground that the buyer could intimate his acceptance of the goods before a reasonable time of examination of them had passed. But as we saw this decision was reversed later on the Misrepresentation Act, 1967, s. 4. A rational similarity seems to exist between the attitude of the Court of Appeal in the case just mentioned and the provision of the Law under examination, since it deprives the buyer of his right to reject the defective goods if he did not send notice before, in the proceeding provided by the Law. In the latter case, from the buyer's behaviour it is understood that he indicates that he waives his right to rely on such lack of conformity.

The procedure required by the ULIS as regards the ascertainment of the faults in the goods handed over (which demands a prior notification sent to the seller within a reasonable time), seems to be important enough in relation to the parties' obligations and remedies, since the result of an inspection of defective commodities will not be of probative value,

² See, suggestion on this subject of the Report of the Law Reform Committee on Innocent Misrepresentation, 1962, Cand. 1782, paras. 14, 15.

³ [1923] 2 K.B.490; [1923] All E.R. Rep.275.

without the preceding procedure being applied. There is only doubt whether the effects will be the same where the buyer failed to invite the seller to examine the goods after he discovered that they did not correspond with the expectations of the contract. Will this failure prevent him relying on the lack of conformity? There is not an answer to this question in the text, but according to the Report of the Special Commission to the Draft of the Uniform Law on Sales,⁴ the Law sufficiently protects the parties' rights:

" . . . by making the probative force of the ascertainment dependent upon a prior notification sent within a reasonable time to the seller or his agent; they can^{then} ensure that the examination is carried out in conditions which safeguard their rights."

These comments refer, of course, to the Draft of 1956, which required that the buyer was bound to invite the seller to attend at any examination on the result of which he (the buyer) intended to rely. The original provision was changed on the view that it would be a useless burden for the buyer if he had to invite the seller to take part in every examination, and also a troublesome procedure for the seller who could not always answer all these requests.⁵ Taking this as a basis the draftsmen adopted the principle mentioned, according to which the buyer is obliged to ask the seller to examine the goods or to cause them to be examined by his agent, after he has discovered faults in the goods sent to him.

⁴ RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.60.

⁵ See, RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, pp.96-97, Observations of the Governments, Comments by the Federal Government of Germany, on this subject.

The last paragraph of Article 39 deals with the method of communication between the parties for sending of the required notice for the purpose which has been already discussed. According to this provision such a method of communication is thought to be any appropriate means used in commercial practice as, letter, telegram, etc. Moreover, the Law had adopted the approach that once such a notice has been sent to the seller it releases the buyer of his duty whether or not it is delayed or fails to arrive at its destination. This provision has been drafted in favour of the buyer and it is against the rights of the seller who can suffer a loss if he has never become aware of the notice sent to him by the buyer, relating to the state of the goods; but the authors of the Draft, trying to balance the divergencies of these facts, thought that the loss of the right to rely on defects of the goods would be of greater importance for the buyer than the loss of the seller in this case. It would be difficult for the buyer to prove the sending of notice, especially if he had used a letter, and business practice may be proved to show that it was likely that the letter was posted, but according to this principle evidence of posting or of sending is sufficient evidence of receipt to entitle the sender to rely on it. This corresponds to the approach adopted by the common law, as well as by the majority of systems of commercial law, relating to the acceptance of an offer in contract law, which is complete, under the circumstances, when it is properly addressed and posted, even if it never reaches its destination, provided that it has actually been posted.⁶

⁶ See, Household Insurance Co. v. Grant, (1879), 4 Ex. D.216; also Trotter v. McLean (1879), 13 Ch. D.574.

GROSS NEGLIGENCE AND GOOD FAITH

The last provision of the present part of the Law is concerned with the functioning of the two foregoing Articles, which have been examined in the present chapter of this study, and constitutes a supplementary rule in relation to them. This provision includes two important elements referring to the seller's obligations as regards the conformity of the goods: the elements of *gross negligence* and *good faith*. The combination of these two principles must work in such a way as to ensure a fair balance of the opposite interests of the buyer and the seller relating to defects of the goods. The general intention of this rule is to relieve the buyer of his duty of examining the goods in a certain time and giving notice to the seller promptly about defects he has discovered, but only in the case where the seller, either (a) had acted in bad faith, that is to say he knew that the goods were defective but deliberately did not disclose it to the buyer or he did promise qualities and characteristics non-existent in the goods, or (b) he did show gross negligence as to the defects in the goods sent to the buyer.

A similar term is included, as we have seen, in Article 36 of ULIS, but this functions in the opposite direction: it deprives the buyer of his rights to be remedied in a number of cases relating to the lack of conformity, if he had shown gross negligence (the buyer knew or could not have been unaware) to disclose such lack of conformity. The proviso of Article 13 is used as a rule of construction for both of these principles. The Law adopting the criterion: the seller "*knew or . . . he could not have been unaware*", requires a consideration of what a reasonable person in the same situation, having the specialist knowledge generally expected under the circumstances, that is to say another merchant such as the seller, would have known under the relevant circumstances.¹

¹ See, R.H. GRAVESON, E.J. COHN, D. GRAVESON, *supra*, p.59.

On the other hand, the rule of good faith has been adopted by most of the legal systems as an essential principle. Most of the Continental European laws even do not admit of exclusions from liability for warranty of title, quality, or fitness of the goods sold in cases where the seller knew or ought to have known of the defects. This approach is somehow contrary to the British commercial law, where the parties have a wide freedom to release themselves from liabilities by including in their agreements express clauses to that effect. The concept of the common law system, it seems, has been adopted, to a certain extent, by the Uniform Law on Sales, especially as regards the effect of clauses included expressly by the parties in their contract. On the contrary most of the European codes² proceed from the concept of fault which is divided in various degrees. If the contractual breach is intentional or is due to the gross negligence of the obligor the exemption clause is inoperative. This attitude is based on the principle of good faith which, according to the opinion of Prof. TALLON,

*"is the normal attitude of people in business and it is to be found in the practices of the business community."*³

In the Sale of Goods Act the principle of good faith is contained in s. 62 (2) which refers to the subject of voidable title in a sale transaction, providing that:

"A thing is deemed to be done 'in good faith' within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not."

² German Civil Code, s.276; Greek Civil Code, Art.332; Italian Civil Code, Art.1229; Swiss Code of Obligations, Art.100.

³ UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES OF GOODS, edited by J. Honnold, p.370.

On the other hand, the Sale of Goods Act has adopted the following approach as regards defects which could have come to light if the buyer had taken advantage of whatever opportunity of examining the goods had been made available to him.⁴ According to this approach the implied conditions of merchantability do not apply in two circumstances:

" (a) as regards defects specifically drawn to the buyer's attention before the contract is made; or

*(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal."*⁵

In Houndsditch Warehouse Co. Ltd. v. Waltex Ltd.,⁶ STABLE, J. pointed out that if the buyer, with knowledge of the defect in the sample rendering the goods unmerchantable,

*"is content to take a delivery which corresponds with the sample, and gets such a delivery, he has no ground for complaint."*⁷

On the other hand, the approach of the common law in regard of defects caused by negligent misstatements or advice given to the buyer in bad faith is that the seller should be made responsible for his advice. It has, also, been accepted that this proceeding produces a "*special relationship*" between the parties, and in these cases the seller's liability is derived from the same basis as for negligent acts; the seller, therefore, has the duty to give honest advice.⁸

⁴ See, Law Commission, Final Report, p.17, para.48, (on Exception Clauses in Contracts).

⁵ s.14(2), (a) and (b) of Sale of Goods Act, 1893.

⁶ [1944] 2 All E.R.518.

⁷ Ibid. p.519.

⁸ See Hedley Byrne & Co. Ltd. v. Heller Partners Ltd., [1964] A.C.465; [1963] 2 All E.R.575. Lord DEVLIN, explicitly recognised in the same case, that the imposition of liability for negligent misstatement was a way of avoiding the doctrine of privity, and of escaping from the search for an artificial consideration.

It will be recalled that most of the national laws have adopted the principle of good faith. In the French Code Civil, for example, special provisions are contained which deal with the guarantee against defects existing at the time of sale, which *prima facie* the purchaser could not discover and which render the goods unfit for the use intended.⁹ Even if the vendor did not know of those defects, the buyer may ask for avoidance of the sale, or for reduction in the price, provided that he acts within a reasonable time.¹⁰ These provisions, which come from the Roman law, are non-mandatory rules and the parties may deviate from them and incorporate different terms in their contract, which, however, must correspond to accepted trade usages. But if the seller knew of the faults he again remains liable. This last provision is drawn from the doctrine of good faith (*bonne foi*), which pervades the whole French legal system, and requires, that in any case, if the total or partial non-performance results from a fault on the part of the seller (in other words if the seller acts in bad faith), the buyer can claim damages in addition to avoidance or rescission of the contract.¹¹ On the contrary, if the non-performance is due to *force majeure* utterly preventing the vendor from performing the contract, in whole or in a part, the vendor is freed of his obligation and has not to pay damages as a rule, and the buyer, unless the property and the risk passed to him before the goods perished, is not liable to pay the price, and the contract is simply void.¹² Conversely, the buyer has no remedy for defects which are so usual that he ought to have suspected their existence and he is supposed to exercise his rights in good faith.

⁹ French Code Civil, Art.1641.

¹⁰ Cf. Art.39(1) of ULIS.

¹¹ Art.1610 of French Code Civil relating to the delayed delivery of the goods, reads: "If the vendor fails to make delivery at the time agreed upon between the parties the purchaser may at his choice apply for the cancellation of the sale or ask to be given possession if the delay had only been occasioned by an act of the vendor." (emphasis added).

¹² See, Prof. R. HOUIN, "Sale of Goods in French Law", in INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Suppl. Publication No.9 (1964), pp.26-27.

The German Civil Code, similarly, regulates the subject of rejection of the contract by the buyer, on the ground of defective goods but the relevant provisions are governed by the doctrine of good faith. Hence, the buyer may reject performance and demand damages:

- (a) if the quality promised is lacking;
- (b) if the seller has kept silent about a defect known to him in contravention of the duty of good faith;
- (c) if the seller has in bad faith misrepresented, though not promised, the existence of certain qualities.¹³

In the common law system although the doctrine of good faith is not unfamiliar in the area of sale contracts there are some opinions expressed against this concept, mainly on the ground that the idea of good faith creates an obstacle to the functioning of the market and the circulation of goods. In Dr. STOLJAR'S viewpoint,¹⁴ expressed in his observations for the need of change of the Law in some principles, he said:

"The first is that far from a small (or 'sensible' or 'progressive' or 'modern') improvement of the law, the change now involved really amounts to a revolutionary challenge to a whole set of legal principles which, especially in the area of sale, have evolved around the concept of bargain rather than around a requirement of good faith. In some cases, such as insurance and perhaps building contracts too, a duty of good faith can work well enough. For in such contracts we can pinpoint the exact materiality of the facts about which the mistake occurs, which is not the case in sale where a party's expectation can be ^{much} more personal. Again, contracts of good faith are usually contracts of continuing relationships between the same sides, whereas in sale the contract is often merely a stepping-stone for other transactions: our rules have thus to be designed to help the functioning of the market and the circulation of goods."

¹³ German Civil Code, ss.242, 259 and 463.

¹⁴ S.J. STOLJAR, Mistake and Misrepresentation, p.82.

The above writer, obviously, believes that the principle of good faith in the field of the sale of goods constitutes a negative element for commercial practice; but his attitude is contrary to the opinion of Prof. TALLON which we saw above, when he said that good faith "*is the normal attitude of people in business*". Indeed, this approach is more comprehensible by the civil law countries' lawyers,¹⁵ from where originally the doctrine of good faith comes.¹⁶ Undoubtedly, the difficulty in the operation of this principle is what is the safe criterion to discover a *malus animus* in the mind of the guilty party in a contract, especially in cases of untrue statements given to the innocent party, which do not include the obvious elements of fraud or deceit, but where the speaker knew of the untruth or did not know whether what he was

¹⁵ But see, J.J. GOW, *Mercantile and Industrial Law of Scotland*, pp.178-79, where he points out the following about the influence of this doctrine in the Scots Law:

"Our doctrine of *bona fides* is of considerable importance in *re mercatoria* and its rigorous restatement, especially in an era of instalment credit and buyers, whose pockets appear large enough to impel them into an activity now become essential to the national economy but are not large enough to enable them lightly to embark upon litigation, is urgently required."

¹⁶ From the beginning of the classical age the principle of *bonae fidei iudicia* which stood in the centre of daily life, was accepted as part of the *ius civile*, because it was thought that good faith was just as binding as a *lex*. The judge's discretion was most extensive in actions which imposed on his task of condemning for "what the defendant ought to give to the plaintiff in accordance with good faith" (*quidquid . . . dare facere oportet ex fide bona*). This principle was functioning in combination with the principle *exceptio doli*, under which fraud (*dolus malus*) committed on the part of both parties, had to be taken into account by the judge; the judge's discretion was directed to judging not only the defendant's but also the plaintiff's conduct in *bona fidei iudicia*, if, for instance, the plaintiff violated *fides* by bringing an action when not entitled to do so. In the case of actions on sale the *actio empti* was primarily for the delivery of the thing sold. However, the vendor of a thing was not bound from the start to give ownership, but only to transfer possession which was free from all factual or legal powers of interference on the part of the vendor himself or of third persons (*vacuam possessionem tradi*). The *actio empti* was also embodied with the doctrine of good faith as regards both legal or physical defects of the goods sold. Indeed, the vendor was liable for and the buyer was entitled to enforce the warranty only in cases of fraud, (*dolus*), on the part of the vendor, that is to say, when fraudulently, (*dolo malo*) and in breach of good faith he knowingly had sold another's thing (legal defects), or failed to disclose any defect known to him (physical defects). (See, further, (cont.)

saying was true and made the statement recklessly without caring whether it was true or false. The answer to this question is quite difficult and it has rather been left to the judge's discretion to adapt the principle according to the circumstances in any case. In Angus v. Clifford,¹⁷ where the directors of a company for purchasing and working a mine, issued a prospectus containing a statement that the reports of certain engineers therein mentioned were "*prepared for the directors*", the reports were appended to the prospectus, and gave a very favourable account of the mine. The reports were, in fact, prepared for the vendors of the mine with a view to the formation of the company; there was no evidence that they were incorrect or exaggerated. The plaintiff took shares in the company on the faith of the prospectus, and the shares having greatly fallen in value, he brought an action of deceit against the directors claiming damages. The Court held, on the evidence, that the directors had no intention to deceive, and used the expression, "*prepared for the directors*", carelessly, not thinking it important, and without considering the true effect of the words. BOWEN, L.J. pointed out as regards the preceding question,¹⁸ that:

"The answer is that there is no such thing as an absolute criterion which gives you a certain index to a man's mind. There is nothing outside his mind which is an absolute indication of what is going on inside. So far from saying that you cannot look into a man's mind, you must look into it if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud. It seems to me that a second cause from which a fallacious view arises is from the use of the word 'reckless' . . . Unless he is conscious that it will be understood in a different manner from that in which he is honestly thought blunderingly using it, he is not fraudulent, he is not dishonest. An honest blunder in the use of language is not dishonest. What is honest is not dishonest."

¹⁶ (cont.)

MAX KASER, "Roman Private Law", 2nd ed. translated by ROLF DANNENBRING, pp.142-143, 144, 176-177, 179, 180.) Undoubtedly the doctrine of good faith was one of the most basic elements in the operation of the Roman law system.

¹⁷ [1891] 2 Ch. D.449.

¹⁸ Ibid., pp.471, 472.

CHAPTER THREE

REMEDIES FOR LACK OF CONFORMITY

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GENERAL OBSERVATIONS

In the previous two chapters of the present study there have been examined two main subjects of the seller's obligations in regard to the conformity of the goods, namely the circumstances in which such lack of conformity is held to exist in the goods, and the procedure by which the existing defects have to be discovered, respectively. These foregoing steps constitute a presupposition for the third and most important step in the present system of the Uniform Law on Sales, that is to say the remedies available for any lack of conformity ascertained. The following pages will be devoted to the examination of the above subject, to which the foregoing rules of the Law, contained in Articles 33-40, have been devoted, and it is undoubtedly of the most important practical significance for the buyer. Because of this importance the subject in question appears to be longer and more extensive in detail compared with the previous two ones. Therefore, the problems under examination justify the nine Articles (41-49) dealing with remedies for lack of conformity in addition to Articles 82, and 84-87 dealing with claims for damages.

The remedies for lack of conformity are based on the same principles as the remedies provided by the Law relating to delivery at a place and date other than that fixed in the contract. This is especially so concerning a lack of conformity which amounts to a fundamental breach of contract. The buyer's right to reject for nonconformity is, however,

much stronger than for the deviation~~y~~ from contractual obligations as to time and place~~for~~ delivery.¹ The Law in its present part, laying down Article 41 which is a compact rule summarising the contents of the following Articles, states the rights to which a party is entitled after notifying the defects in the goods handed over. According to the expression of this rule the buyer is given the choice of three solutions: to require performance of the contract by the seller, to declare the contract avoided, to reduce the price; in addition to the avoidance the buyer may claim damages even though the defects are not due to any negligence on the part of the seller. Specifically, the second paragraph of Article 41 provides that the buyer may also claim damages as provided in Article 82 or in Articles 84 to 87. This latter provision, however, is in contrast to many national legal systems based on the civil law world, where the seller is only liable to pay damages if the lack of conformity is imputable to a fault on his part, and it formed controversial discussions in the Conference between the representatives of various municipal laws.

The following pages will be devoted to the examination of the above mentioned system of remedies afforded by the Law to the buyer for a breach of the contract on the seller's part, with regard to the conformity of the goods sold. First will be examined the claim of the buyer for specific performance; then his right to declare the contract avoided (fundamental breach of contract); the right to reduce the price; and, finally, the subject of the subsidiary remedy: the claim of damages.

¹ See, J. HONNOLD, "The Uniform Law for International Sale of Goods: The Hague Convention of 1964", in LAW AND CONTEMPORARY PROBLEMS, vol.30 (1965), p.337.

Besides, there will be discussed a number of restrictions established by the Law in several places, on the buyer's right to declare the contract avoided.

SPECIFIC PERFORMANCE

Article 42 specifies the circumstances entitling the buyer to require performance in various possible situations. It provides for the cases where specific performance is possible, as one of the remedies available to the buyer, relating to his rights in the goods, according to which the seller may be required to perform in *natura*,¹ but it is left to the discretion of the court in the State where the action is brought whether or not such remedy will in fact be granted. In formulating the present rule the draftsmen, after some conflicts existing between the principles of different legal systems, arrived at the conclusion that the restricted concept adopted at this point by the common law system had to prevail. According to the wording of the Law the buyer may require specific performance from the seller in the following cases.²

"(a) if the sale relates to goods to be produced or manufactured by the seller, by remedying defects in the goods, provided the seller is in a position to remedy the defects;

(b) if the sale relates to specific goods, by delivering the goods to which the contract refers or the missing part thereof;

(c) if the sale related to unascertained goods, by delivering other goods which are in conformity with the contract or by delivering the missing part or quantity, except where the purchase of goods in replacement is in conformity with usage and reasonably possible."

¹ See, R. GRAVESON, E. COHN, D. GRAVESON, "The Uniform Laws on International Sales Act. 1967", p.78.

² ULIS, Art.42(1).

The list of remedies cited above appears to be a logical sequel to that included in Article 41, adding therefore a fourth limb to the three contained in this Article, which, in brief, is a claim for specific performance. The operation of these provisions is to be practised under certain restrictions, as they are described by the above cited Article. The importance of the claim for specific performance for the buyer instead of other remedies available (as, for example, the estimation of damages), is the fact that in certain cases the value of the article sold itself is worth more for the buyer than its market price.

Difficulties arise in the interpretation of the term "specific performance", as well as of those of "specific goods" and "unascertained goods", which are not defined or are not sufficiently defined in the Law. On the other hand, national legal definitions regarding to these questions, varying from one municipal law to another, create many complexities which the draftsmen of the Law avoided having to resolve. There is a different approach to the solution of the problem of specific performance between the common law and the civil law systems. It is known, also, that the most representative legal families belonging to the civil law world are the French and the German laws. However, there are considerable differences even between these two sub-categories of the civil law system, regarding to the same subject matter. The theoretical approach of the French law lies nearer to the common law, since the Code Civil³ provides that in case of non-performance the obligation is resolved into a claim for damages which is the ordinary remedy of the buyer and specific

³ Art.1142.

performance is not always granted. In judicial practice, however, the French law works quite similarly to the German law, and the French courts qualify the claim for specific performance as an important remedy by means of requiring the seller to perform or to refrain from doing certain acts under the force of being bound to pay the buyer a special sum of money pronounced by the courts as a penalty (*astreinte*),⁴ which is similar in effect to the common law decrees of specific performance. If the goods are ascertained, whether of special value or not, the buyer can obtain a grant of specific performance by means of obtaining by a court a special decree of *raisie-revendication*.^{4a}

On the contrary, under the German Civil Code⁵ the seller's primary duty as regards his obligations in this matter is to perform specifically, whereas an action for damages is merely regarded as a sort of secondary remedy which is offered as a substitute where the seller does not comply with his primary duty to perform specifically.⁶ Practically there are only rare instances under the German legal system where the buyer is entitled to obtain a decree of specific performance. Regarding the sale of generic or unascertained goods the German Civil Code⁷ provides that the seller who is obliged to deliver such kind of goods is strictly liable to damages if he is unable to deliver the goods in time, provided that these goods are available somewhere in the world, whether this inability is due to his fault or not.⁸

⁴ See further, A. SZAKATS, ^{The} "Influence of Common Law Principles on the Uniform Law on ^{The} International Sale of Goods", in INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, vol.15 (1966), pp.767-768.

^{4a} French Code of Civil Procedure, Art.826.

⁵ s.241

⁶ See, Prof. K. ZWEIGERT, "Aspects of the German Law of Sale", in INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Suppl. Publ. No.9 (1964) p.5.

⁷ s.279.

⁸ See Prof. K. ZWEIGERT, *supra*, p.6.

Under the Sale of Goods Act, 1893 the buyer's right to apply for a decree of specific performance for failure to deliver specific or ascertained goods, is limited. It is left to the discretion of the Court, where the circumstances exist, to grant a decree of specific performance. This discretion is exercised by the courts whenever the goods are unique or of special value for the buyer, and where in the circumstances damages would not be an adequate remedy. Specific performance is expressly provided by section 52 of the Sale of Goods Act, 1893 as follows:

"In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree."

Generally speaking, English courts are somewhat reluctant to order a party to perform his contract specifically, although the Sale of Goods Act with its section 52 intended to broaden the scope of the remedy. Section 52 of the Act was based on section 2, of Mercantile Law Amendment Act, 1856, which was passed to bring English law in line with Scots law, under which specific relief is much more readily granted.^{8a}

^{8a} See G.H. TREITEL, The Law of Contract, 2nd ed. p.689, note 48. There is a special proviso in s.52, para.2 of the Sale of Goods Act, referred to the Specific Implement of the Scottish law, the following:

"The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland."

This remedy is considered as the primary remedy under the Scottish law, but the courts have also a discretion whether to grant it or not. (See Stewart v. Kennedy (1890) 17 R (H.L.) 1, 9). A court in Scotland will not be expected to grant this remedy in the following circumstances, in the contract law in general: (cont.)

Similarly to the Sale of Goods Act, 1893 the Uniform Commercial Code allows in principle the granting of decree of specific performance only:

*"where the goods are unique or in other proper circumstances."*⁹

But the Uniform Commercial Code using the expression "other proper circumstances", which works as a criterion of the undefined term "unique" appears to be wider in this subject than the Sale of Goods Act, and the courts have a wide power to grant a decree of specific performance in cases where the buyer is unable to purchase goods in substitution for those due from the seller.¹⁰

The draftsmen of the Law in discussing the present problem encountered difficulties in balancing the complexities existing between

^{8a} (cont.)

(1) Where the obligation is to pay a sum of money because the ultimate sanction for non-compliance with a decree of specific implement is imprisonment and imprisonment for non-payment of civil debts has been, with certain exceptions, abolished.

(2) Where the contract involves personal relationships, (but see Chappell and Others v. Beaverbrook Newspapers Ltd., "The Times", January 22nd 1975).

(3) Where the performance has become illegal or impossible, (see Rudman v. Jay 1908, S.C.552).

(4) Where the court could not enforce its decree by imprisonment, e.g. defender is unincorporated body, (see Gall v. Loyal Glenbogie Lodge (1900) 2 F. 1187).

(5) Where there is nothing special about the contract or its subject matter which cannot be covered by an award of damages. (See Union Electric Co. Ltd. v. Holman & Co. 1913, S.C.954).

(6) Where enforcement would in view of the court impose exceptional hardship.

⁹ UCC. s.2-716.

¹⁰ See, A. SZAKATS, *supra*, p.769.

the concepts of the various legal systems and finally, decided to leave it in the discretion of the national courts where the dispute between the parties is settled, to grant a remedy of specific performance, although the Uniform Law is, in principle, designed to exclude the application of private international law,¹¹ as it has been seen. According to the relevant condition of the Law, the buyer, primarily, has an unconditional right to obtain specific performance when the sale relates to specific goods, but this right of the buyer will always depend on which legal system the contract relates to, the court of which shall not be bound to enter or enforce such a decision except in accordance with the provisions of Article VII of the Sale Convention. This Article in its first paragraph which, in the present articulation, is introduced by Article 16 (contained in the General Provisions) of the Law, reads:

"Where under the provisions of the Uniform Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law."

The second paragraph of the foregoing Article has been designed to exclude any effect on the principle of the rule in paragraph 1 in any Convention of Contracting States concerning the recognition and enforcement of judgments. It will be noted that the operation of this Article is put out of the parties' power to exclude it by express or implied agreement entirely or partially from their contract, as is provided for any other Article of the Law according to the provision of Article 3; this is, probably, the only Article in the Law which limits the general freedom of the parties to exclude the application of any part of the Law in their contract.

¹¹ ULIS Art.2, ULFIS Art.1(9).

It has been seen that Article 42 contains some analytical provisions relating to the meaning and the operation of the claim for specific performance, although the application of Article 16, as has been said, overrides the rules giving the buyer the right to claim specific performance in certain circumstances, because such a right can be obtained by the buyer when specific performance is allowed by the national court hearing the case. In that case the provisions of Article 41 (1), (a) and 42 become simply a dead letter in the Law.¹² In the opposite case, according to the provisions mentioned, if the goods have been manufactured or produced by the ~~seller~~, whether the manufacture or production be before or after the contract, but also if being a dealer he has repair facilities, the buyer can claim that the seller make good the defects whenever they are such that he can effect them. It is irrelevant whether according to usage he ought to be in a position to remedy defects.¹³ If the sale related to specific goods and the delivery consisted in the handing over of part only of the goods or different goods than those which had been agreed upon, the buyer can claim the missing portion of them agreed in the contract.¹⁴ Finally, if the goods are unascertained the buyer can claim the missing quantities or other goods in replacement, provided, in the latter case, that it is not in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates.¹⁵ In the latter case if the buyer does not purchase goods in replacement, then he cannot claim specific performance of the contract. The term "usage" in the present Article must be interpreted in the spirit of the general principle of Article 9 of ULIS.

¹² R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.61.

¹³ ULIS Art.42(1), (a).

¹⁴ Ibid. Art.42(1), (b).

¹⁵ Ibid. Art.42(1), (c).

The second paragraph of Article 42 gives, finally, an alternative solution for the buyer, if the municipal court hearing the case does not grant him the satisfaction of specific performance, or if the seller fails to perform within a reasonable time. In this case the buyer retains the right to bring into operation the remedies given in Articles 43 to 46. The following pages will be devoted to the examination of the latter solution.

AVOIDANCE OF THE CONTRACT: FUNDAMENTAL BREACH

The second of the remedies afforded to the buyer for a breach of contract relating to the conformity, we have seen, is the right to declare the contract avoided. The text uses in this case the expression "*declare the contract avoided*"¹ which corresponds to the equivalent term of the Sale of Goods Act, 1893, "*repudiate*". The buyer can declare the contract avoided wherever there is a fundamental breach of the seller's obligations as to the foresaid subject, which is elaborated by Article 43 of the Law. Besides, the definition of the fundamental breach is given by Article 10 as follows:

"For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects."

It becomes clear from this Article that the draftsmen tried in this case to establish an objective criterion as regards the meaning and the

¹ ULIS Art.41(1), (b).

operation of the term "fundamental breach" which is one of the basic concepts of the Law and is scattered throughout its text.² It will be noted that there were some objections during the discussions in the Conference and comments had been submitted to the contrary, as to the adoption of the above concept.³ The British Government had submitted a simple formula regarding to the definition of the fundamental breach, the following:

*"A breach of contract shall be deemed to be fundamental, wherever the performance of the contract is by reason of the breach, rendered radically different from that for which the parties contracted."*⁴

It has been said that under the Sale of Goods Act, 1893 a breach of an obligation is considered as a fundamental breach in certain cases where, according to the construction of the contract and other circumstances, the breach goes to the root of the contract. This is the basis of the distinction in the Act between conditions and warranties. German, Greek and Swiss law treat a breach as fundamental if it renders the performance useless for the innocent party,⁵ while the French law has adopted the doctrine of *"erreur sur la substance"*. Total non-performance of the obligation to deliver, on the part of the vendor gives the purchaser the right to avoid the contract (*résolution*). The same happens in case of partial performance or bad performance which

² See Arts. 26, 27, 28, 30, 32, 43, 51, 52, 55, 62, 66, 70 and 76 of the ULIS. Prof. TUNC observed (in UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES OF GOODS, ed. by J. HONNOLD, p.377) that those who drafted Article 10 had balanced the subjective and objective concepts. In Art.10 the word "knew" is a subjective concept whereas "ought to know" is an objective concept. The economic aim of a contract is an objective concept, but when this aim is viewed in light of the circumstances of the parties and conditions under which they dealt, the choice between the subjective and objective approaches is not a harsh one.

³ RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.273.

⁴ Ibid., p.274.

⁵ Under the Greek Civil Code, the buyer is entitled to claim damages for total non-fulfilment on the part of the seller; he also is entitled to declare the contract avoided if the seller is found unable to (cont.)

affects an essential element of the contract without which the purchaser would not have contracted; by virtue of commercial custom, the purchaser can elect to demand in that case a reduction of the price (*réfaction*), if, for example, there is a delivery of only part of the order or if the goods delivered are of quality inferior to that arranged.⁶

The concepts discussed above are not standing at a great distance from the Law's concept as to the fundamental breach, on which depends, whether a breach is fundamental or not, the actual or required knowledge on the part of the party in breach at the time of the conclusion of the contract. The Law uses two criteria in this case: firstly, what a reasonable person in the same situation as the aggrieved party would have decided (at the time of the conclusion of the contract) if he had foreseen the breach and its effects; and secondly, if the party in breach at the time of the conclusion knew or ought to have known that in the event of such foreknowledge, as has been referred to under the foregoing criterion, the innocent party would not have entered into the agreement.^{6a} The reasonable person-standard referred to in Article 10 of the Law is connected with the subjective opinion of the judge which will play the most important part for the operation of this

⁵ (cont.)

fulfil his obligations and fraud is involved, (Art.382). When the seller is found responsible for delay at the date fixed or for defective fulfilment of his obligations, the buyer is entitled to exercise the above rights, where the defects are so fundamental that they render the performance useless for the buyer, (Arts.383-385).

⁶ Prof. R. HOUIN, "Sale of Goods in French Law", in INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Suppl. publ. No.9 (1964), p.26.

^{6a} See, R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.55.

principle, whenever he copes with this controversial problem in a specific case. It will be, undoubtedly, not without difficulties for the courts to give a fair solution in such a dispute so reconciling the divergent interests of the contracting parties; because to be approved by the courts a rejection of the contract by the aggrieved party as being fundamental must be proved as such as clearly as possible, because of disastrous effects, sometimes, for the interests of the party in breach.⁷ However, the principle of the fundamental term has proved to be workable satisfactorily in the civil law and in the common law systems, and it is possible to be proved so in the case of the Uniform Law, although some writers⁸ have expressed fears about the workable possibility of this principle in the case of the Law. It has been mentioned that the Law, apart from the subject under examination for fundamental breach on the part of the seller (as regards his obligations to the conformity of the goods), provides also a number of other

⁷ A parallel provision to the rules concerning the remedies for breach of the contract by the seller is that of Art.62 of ULIS, according to which where the failure to pay the buyer the price amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. Here the seller has to inform the buyer of his decision within a reasonable time, otherwise the contract is *ipso facto* avoided. If, on the other hand, the buyer's failure does not amount to a fundamental breach of the contract, the seller may grant an additional period of time of reasonable length and if the price is still unpaid at the expiration of this period, the seller may elect between requiring the payment of the price by the buyer and, provided that he does so promptly, declaring the contract avoided.

⁸ See, L.A. ELLWOOD, "The Hague Uniform Laws Governing the International Sale of Goods", in INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Suppl. Publ. No.9 (1964), pp.45-46, who points out: "*The emphasis on 'fundamental' seems to imply some distinction which might be in the contemplation of the parties contracting with a venial or trivial breach. One wonders if such a rule is workable.*"

specified cases where a breach is considered as a fundamental breach of the seller's obligations in the contract, the following:

- (a) failure to deliver the goods or documents on the date fixed;⁹
- (b) failure to deliver goods or documents at the place fixed when failure to deliver on the date fixed would also amount to a fundamental breach;¹⁰
- (c) delivery of the goods by the seller to a carrier at a place other than that fixed;¹¹

Finally the Law lays down a general proviso at its section IV under *of Chap III* the heading "*other obligations of the seller*", in order for the buyer to recover for any other case of fundamental breach of the contract, not specifically provided in the text which reads:

"If the seller fails to perform any obligation other than those referred to in Articles 20 to 53, the buyer may:

(a) where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with Articles 84 to 87, or

(b) in any other case, claim damages in accordance with Article 82." ^{11a}

When such a failure amounts to a fundamental breach in a sale contract is a question of fact and the court which will be called to decide must take into consideration the special circumstances of the case, the intention of the contracting parties and also the effects resulting from the breach or breaches in the contract; because a fundamental breach of contract may possibly include one breach or a number of

⁹ ULIS Arts.26, 28, 51.

¹⁰ Ibid. Arts.30, 51.

¹¹ Ibid. Art.32.

^{11a} Ibid. Art.55(1)

breaches rendering the performance quite different from that which the parties agreed upon. But in English judicial practice not every breach of fundamental term will amount to a fundamental breach. In Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.,¹² the defendants designed and erected in the plaintiffs' factory a system for conveying and storing molten wax. This was wholly unsuitable because it was liable to distort at temperatures above 187°F and had a low thermal conductivity as it incorporated plastic pipelines which could not withstand this high heat. As a result the plaintiffs' factory burnt down. The Court of Appeal held that there had been a fundamental breach of contract, but it would seem that if the defect had been discovered before the accident, the defendants would have been entitled to remedy the defect at their own expense by substituting steel pipelines, although the contract provided for plastic ones, and although the system was unfit for the purpose for which it was intended with plastic pipelines. The breach would not then have been a fundamental one. The fact that it is not the breach itself which counts so much as the events resulting from it; it is also related to the way in which the breach has taken place. Lord DENNING, M.R., in the case under discussion, in order to determine whether a breach is deemed as a fundamental or not, observed:

*"If they [the defendants] have broken it in a way that goes to the very root of it, then it is a fundamental breach. If they have broken it in a lesser way, then the breach is not fundamental. In considering the consequences of a fundamental breach, it is necessary to draw a distinction between a fundamental breach which still leaves the contract open to be performed and a fundamental breach which itself brings the contract to an end."*¹³

¹²[1970] 1 All E.R.225; [1970] 1 Q.B.447 C.A.

¹³[1970] 1 All E.R., p.233.

The learned judge in addition classifies these two categories of fundamental breach by their effects as to the contract. In the first case, where the contract is still open to be performed, the effect of a fundamental breach is that it gives the innocent party, when he gets to know of it, an option either to affirm the contract or to disaffirm it, and if the latter happens, then the contract is at an end from that moment. In the second case, where the fundamental breach itself brings the contract to an end, there is no room for any option for the innocent party, as happened in the above case where the fire was so disastrous that it destroyed the mill itself.

The text of the Law itself as regards the subject under examination specifies the circumstances entitling the buyer to avoid the contract in a case of a fundamental breach. Article 43 is analogous to Article 30 which is related to delivery at a place other than that fixed in the contract. In both cases, however, (namely, where lack of conformity occurs in a sale, as well as failure to deliver at the place fixed, each of which constitutes a fundamental breach), cannot be regarded as a ground of avoidance for the buyer: the Law requires another element, that such a lack of conformity could not be made good in such a time causing a fundamental delay that avoidance of the contract is open to the buyer. Moreover, the Law requires that the buyer must avail himself of this right as rapidly as possible ("promptly"), after giving the seller notice of the lack of conformity,¹⁴ or in the case where the buyer demanded specific performance and did not obtain it within "*a reasonable time*"¹⁵ he must also exercise his

¹⁴ ULIS Art.43.

¹⁵ Ibid. Art.42(2). This is an objective criterion used by the Law in particular cases and means the time which a reasonable man in the same situation would take into account. The idea is taken up in Article 13 which refers to "*a reasonable person in the same situation*".

consequential rights after the expiration of this period. If the buyer showed negligence in exercising the foregoing rights in the proper time, he is deprived of his right to declare the contract avoided for fundamental breach of the contract. Once again, the Law seems to be strict in its rules for avoidance, since it demands rapid rejection on the buyer's part,¹⁶ and this rule seems to be reasonable in virtue of which the buyer will be not allowed to wait and watch the movement of prices, provided also that the goods have been handed over to the buyer and have to be transported again in case of avoidance.¹⁷ On the other hand, there are some categories of defects included in the text of the Law where the buyer is not bound to give notice to the seller about his decision for avoidance, if there is a fundamental breach of contract, but the mere fact that a certain period of time has passed without any answer on the part of the buyer, renders the contract *ipso facto* avoided even though the seller had requested beforehand that the buyer make known his decision. Such cases of fundamental breach with such an automatic result are:

- (a) Fundamental breach relating to the date fixed for delivery of the goods, provided that the seller has not effected delivery before the buyer has made known his decision to the seller and, at the same time he (the buyer) does not exercise promptly his right to declare the contract avoided.¹⁸ The same will happen in the case where the seller does not deliver the goods at the date fixed and a price for such goods is quoted on a market where the buyer can obtain them.¹⁹

¹⁶ ULIS Art.39(1), 43, 55(1)(a).

¹⁷ See Prof. TUNG, "Commentary" in RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.I, p.376.

¹⁸ ULIS Art.26.

¹⁹ Ibid. Art.28. See, R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.69, where they expressed the opinion that the expression "*can obtain them*" refers to a reasonable economic possibility, not to a remote physical one so if, for example, both parties reside in Europe, quotation in Japan is irrelevant if the goods are not normally obtained from there and can now be obtained from Japan only at the cost of wholly uneconomic sacrifices. The writers mentioned are also of the opinion that the phrase of the Law under discussion refers also in cases where the goods whose price is quoted on a market where the seller can obtain them, on the ground of the principle *argumento a minore ad maius*.

- (b) Fundamental breach relating to the date and the place fixed for the delivery of the goods which means that each of these two conditions must amount to fundamental breach, provided also, in this case, that the seller has not transported the goods to the place fixed before the buyer has made known his decision to the seller. If the latter happens the contract cannot be avoided in case the buyer did not exercise promptly his right to declare the contract avoided.²⁰
- (c) Finally, fundamental breach relating to the date and place fixed by the contract or by usage for handing over any documents relating to the goods.

This fact also renders the contract automatically avoided but the limits related to its effect have already been discussed in the foregoing two categories which apply here as well.²¹ If the documents handed over to the buyer are not in conformity with the contract to an extent constituting a fundamental breach of the contract the buyer can exercise his rights as provided under Articles 41 to 49 of the Law. If the breach is not fundamental, the seller retains the right to deliver any missing part of the quantity of the goods, to deliver other goods which are in conformity with the contract, or to remedy any defect in the goods handed over. He can do so after the expiration of the period fixed for the delivery of the goods, but provided always that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.²² This provision of the Law corresponds to

²⁰ ULIS Art.30. This Article corresponds to Article 26. In both cases silence on the part of the buyer is considered as rejection of the contract. This provision is unfamiliar in the English law. But the effect of this provision, as we have seen, is restricted by paragraph 3 in Art.26 and paragraph 3 in Art.30, respectively. In case of an automatic avoidance of the contract damages can be claimed under the appropriate Articles.

²¹ Ibid. Arts. 50 and 51.

²² Ibid. Art.44(1). Cf. Arts. 27(1) and 31(1). The corresponding Article 44(1) in the 1956 Draft (Art.53), used a different form of wording, as follows: ". . . provided that such repairs cause the buyer neither appreciable inconvenience nor expense".

Article 37 which provides for the case of premature delivery. For this rule to be applied there must exist two presuppositions: (a) the seller not to be found guilty of committing a fundamental breach and, if so, (b) the exercising of his right does not seriously inconvenience the buyer.

The second paragraph of the Article under discussion allows the buyer to avoid indefinite suspense thus putting to an end the seller's right to perform his obligation. The buyer fixes for a second delivery another period of reasonable duration at the expiration of which, if he has not obtained satisfaction, he can make use of one of the three rights conferred on him by Article 41, that is to say, he has the option either, again, to require performance of the contract, or to reduce the price, or even, provided he acts promptly, to declare the contract avoided.²³ In this case the Law establishes a condition in

²³ The Special Commission of the Conference in their Report (RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.61), observed a difference between the second clause of the first paragraph of Article 44 of the text - Article 53 of the 1956 Draft - and Article 42 (1) (c) - Article 51 (c) of the 1956 Draft - the following:

While Article 42 of the text (51 of the 1956 Draft), which governs specific performance, only allows the buyer to claim that the defects be made good, which is a claim for specific performance, if the sale relates to goods to be produced or manufactured by the seller, Article 44 (53 of the 1956 Draft) - which is broadly applicable in every case where the seller intends to make good defects in order to escape remedies for want of conformity - is directed more widely to specific goods or to goods to be manufactured or produced, even by some person other than the seller. According to the Commission's Report this difference has one justification: Article 42 of the text - 51(c) of the 1956 Draft - allows only the buyer to claim that the manufacturer himself make good defects, subject to the further condition that he is able to do so, which is reasonable, while it is appreciated that a seller who is not the manufacturer of the goods can, nonetheless, in certain cases take the initiative and himself offer to repair the faults.

which non-fundamental breach may become fundamental.²⁴

Another possibility for the buyer to declare the contract avoided is provided by the following Article 45. This Article provides first for a partial avoidance in case the seller has delivered part only of the goods, as well as in the case where this part of the goods delivered do not conform with the contract. In this case Article 45 provides that the provisions of Articles 43 and 44 of the Law (these two Articles, as we have seen, deal with the remedies given to the buyer for a fundamental breach on the part of the seller), primarily only apply to that part, that is to say the buyer is entitled to declare the contract avoided to the extent only of the missing part or the missing quantity, or the part or quantity which do not conform with the contract. The buyer may, however, declare the contract avoided in its entirety *"if the failure to effect delivery completely and in conformity with the contract amounts to a fundamental breach of the contract"*.²⁵ This rule of the Law, as well as the rule included in Article 47 which provides for the case where the seller proffers to the buyer a larger quantity than that contemplated for in the contract, elaborates the general policy of the Law as to the present subject included in the first paragraph, sub-paragraph (a) of Article 33, which has been examined in the first chapter of the present study. It will be recalled

²⁴ Cf. Art.27(2) of ULIS. This policy of the Law has been strongly criticised by the Federal Government of Germany in their submitted Observations (RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.99), as an "unfortunate" provision creating uncertainties as to when and in what way the seller can and should invoke these rights. *"From this can follow uncertainties and doubts even as to the buyer's right to fix a period of time. The Federal Government thinks that this form of wording should be suppressed."*

²⁵ ULIS Art.45(2).

that for this right of the aggrieved party to be exercised the breach must be "material";²⁶ but both provisions are more favourable to the seller than the Sale of Goods Act, 1893, which gives, in the same case, the buyer the right to accept or reject "*the goods so delivered*",²⁷ where there is such a lack of conformity. The above mentioned rule of the Law (Article 47) which, in principle, applies to the sales of unascertained goods,²⁸ provides that the buyer may reject or accept the quantity which exceeds that agreed upon in the contract. If the buyer rejects he may claim damages if he has suffered any loss through the proffer of the excess quantity; in the event of acceptance, a proportionate increase in the buyer's price will take place. The formulation of the text as to the subject under examination differs slightly from the formulation in the Draft of 1956 where the two Articles were put in a sequence (Articles 55 and 56) as being related basically both of them to the same problem, i.e. the nonconformity of the goods sold as to quantity. In the present formulation of the Law, Article 46 which deals with the right of the buyer to reduce the price has been interposed. The basic difference between the two Articles (45 and 47) discussed above is that although both of them are concerned with nonconformity as to quantity, Article 45 only includes a possibility

²⁶ See *supra*, p. 76 *et seq.*

²⁷ s.30. Indeed, according to the theory and practice of the Act, where the quantity of the goods delivered is less than that contracted for, on the one hand, or where the quantity of the goods delivered is larger than that which was expected, on the other hand, the buyer may accept or reject the whole bulk of the goods in the first case and not only those which are not defective, and in the second case the buyer is not allowed to accept part only of the excess quantity. See, *Household Machines Ltd. v. Cosmos Exporters Ltd.*, [1947] K.B.217.

²⁸ "*Determining whether the contract relates to unascertained or specific goods is a question of circumstances to be governed by the intention of the parties*", according to the Report of the Special Committee's attitude, (in RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.62).

for the buyer to declare the contract avoided for fundamental breach, while Article 47 in case of nonconformity gives the buyer the right "*only for damages in accordance with Article 82*". This approach of the Law is justified because the excess quantity of the goods delivered to the buyer, which is found in breach of the latter rule, cannot establish a ground for a fundamental breach entitling the buyer to reject the whole contract. A claim of damages seems to be a sufficient restitution for the buyer's loss, which is not enough in the case of breach of Article 45, under certain circumstances. On the other hand, the present formulation of the text seems possibly justified on the thought that the draftsmen preferred to give, in this part of the Law, a sense of hierarchy to the remedies of the buyer putting at first the declaration of the contract avoided, the claim for specific performance, the reduction of the price and, finally, the right to claim damages which can co-exist with any one of the other remedies, under certain circumstances.

At the present part of the Law there is another provision which entitles the buyer to go to the breach of the contract as provided in Articles 43 to 46. This clause is contained in Article 48 but is based on a different ground from those we have seen above: it recognises the buyer's right to declare the contract avoided even before the time fixed for delivery of the goods agreed to be sold. For such a right to be exercised by the buyer there must be sufficient indication that the goods which would be delivered in the future would not correspond with the contractual expectations. Any intimation, whether by words or by conduct that a party declines to continue with the contract is a repudiation. This concept of the Law corresponds to the principle of

"anticipatory breach" in the Sale of Goods Act, 1893, but the Law's concept is wider, for it does not define the facts from which the failure to perform may be. Hence, these facts in the Law have been left to the discretion of the courts to be specified. The future defect in this case must be of such character that it goes to the root of the contract, like any other case entitling the buyer to declare the contract avoided. In DEVLIN'S, J. words:

"anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited." ²⁹

The innocent party can bring his action for breach of the contract as rescinded and sue for damages, as soon as an anticipatory renunciation occurs and he is not bound to wait for the time of performance to fall due.³⁰ It is enough for the innocent party to exercise his right of rescission that the other party before or during the time for performance, declares his intention of not performing or continuing to perform his promise, or disables himself from doing so.³¹ In an old family law case of the English courts Frost v. Knight,³² the defendant promised to marry the plaintiff as soon as his (the defendant's) father should die. During the father's lifetime the defendant announced that he would not marry the plaintiff. Although the time for performance had not arrived, the plaintiff successfully brought an action for breach of

²⁹ Universal Cargo Carriers Corp'n. v. Citati, [1957] 2 Q.B.401, 438; [1957] 2 All E.R.70, 85.

³⁰ See, Hochster v. De la Tour (1853), 2 E. & B. 678.

³¹ See, DIAMOND, CORNISH, GRABINER, NOCK; "Sutton and Shannon on Contracts", 7th ed., p.343.

³² (1872) L.R.7 Ex. 111.

promise of marriage. According to the decision she might, if she had liked, have held the defendant to his promise, and then, if after the father's death the defendant had been willing to marry her, she would have had no cause for action. The quoted case is viewed as belonging to the general field of the contract law, and its importance is considered as such for the leading concepts expressed there regarding to this field of the common law.

After the buyer has repudiated the contract, before the due date of performance, he is under the duty to act as reasonably as he can in order to mitigate the damages resulting from the breach. On the other hand, the existing divergence as to whether or not the innocent party after an anticipatory breach has occurred, can insist on carrying out his part of the agreement and receive payment therefor, has been clearly established now by the Scottish case, White & Carter (Councils) Ltd. v. McGregor,³³ where a firm of advertising contractors supplied local authorities with litter baskets in return for the right to place advertisements on bins. The contractors agreed to advertise a garage proprietor's business in the above way for a period of three years. The defender repudiated this arrangement later on the day that it had been made. The pursuers, nevertheless, went ahead, placed the advertisements and, at the end of the period sued for the sum due under the contract. The House of Lords held that the pursuers' claim was entitled to succeed. It has been accepted, therefore, that the innocent party is free to carry out his part of the contract at least where his performance does not require the co-operation of the other party, and he can

³³ 1962, S.C. (H.L.) 1.

then sue the repudiating party for performance of his part. But Lord KEITH, in the case discussed above, pointed out that this principle is not normally applicable to sales of goods where the passing of property, which is usually necessary before the price can be recovered, will require the acceptance of the goods by the buyer. Property can only pass with the intention of the buyer as well as of that of the seller, and the courts will not enforce acceptance of delivery unless in certain cases where they may order specific implement.^{33a} They will merely give damages for failure to take delivery. Nor will they give a decree *ad factum praestandum* for the payment of money.³⁴ Finally, in the same case there was recalled by Lord REID the general rule, which has undoubtedly been adopted by both the Scottish and English courts, regarding the present problem, namely:³⁵

"If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the other party, the innocent party, has an option. He may accept the repudiation and sue for damages for breach of contract, whether or not the time of performance has come; or he may, if he chooses, disregard or refuse to accept it and then the contract remains in full effect."

Similar to the provision of the Law above discussed, is that of Article 76 of ULIS which is comprised in the section III, sub-section A, under the heading "Supplementary Grounds for Avoidance". This rule is of a wider sense in the text as dealing with the provisions of both parties' right to declare the contract's avoidance for the reason under examination. This is a principle of general importance and its

^{33a} See above, pp.124, 125, footnote 8a.

³⁴ 1962 S.C. (H.L.) 1, 20.

³⁵ Ibid., p.12.

intention is that the innocent party is not to be kept bound, where it is quite clear from the facts which have been discussed, that the other party has no intention or is unable to perform his obligations in the contract.³⁶ But, broadly speaking, avoidance is only permissible by the Law if there is good reason and sufficient intimation to fear failure of performance at the level of fundamental breach on the part of the other party.

The same should be applicable in the case of Article 75 by which sale contracts for delivery of goods by instalments are covered. Both parties have the right to declare the contract avoided for the reason of any failure by the other party to perform any of his obligations in respect of the future instalments. While under the paragraph 2 of the same Article there is granted to the buyer an additional right (no corresponding right is granted to the seller), to "*declare the contract avoided in respect of future deliveries or in respect of deliveries already made or both, if by reason of their interdependence such deliveries would be worthless to him*". The question why this additional right has been afforded to the buyer only, but not to the seller, is justified on the basis of the different character and

³⁶ In a Scottish case, Gilfillan v. Cadell & Grant, (1893) 21 R.269, a purchaser of heritage objected to the title tendered by the seller on the ground that it was defective. The seller having written a letter refusing to give any other title, the purchaser repudiated the contract. In the course of an action brought by the seller against the purchaser for implement, the pursuer admitted that the title previously tendered was defective but tendered a valid title. Held that the purchaser had been justified in resiling from the contract, and was entitled to absolvitor. Lord KINNEAR, justifying the purchaser's rejection of the contract on the ground of the seller's intimation that he was unable to fulfil his obligation, when the seller sent a letter to the purchaser which was an offer in certain terms, observed:

"There was a plain intimation by the seller that he was not ready or able to perform the contract. By his own writing he put himself in breach of his contract, and gave the buyer (In the text the word is "seller", probably by clerical mistake.) a right to say 'If that is all you will do I cannot accept your terms, and the contract is off'. I am of opinion that the (cont.)

operation of the two parties' rights in this situation; this is connected with the nature of the article which each party in a contract is bound to deliver to the other party according to the contemplations of the contract. Prof. GRAVESON'S remarks on this question are as follows:

"The reason is that the individual instalments in which the purchase price is paid are not treated as so interdependent as to justify the application of the rule and that the other obligations of the buyer are not sufficiently important to affect those parts of the agreement which are already a matter of the past." ³⁷

The rule of Article 75 corresponds to the rule of section 31 (2) of the Sale of Goods Act, 1893, which deals with the subject of instalment deliveries, in general, but the latter is applicable by analogy in cases for anticipatory breach in sale contracts by instalments; because a refusal on the part of a party to perform his obligation which is expressed prior to the date of performance, has the same effects as a repudiation expressed after that date.³⁸ The Law is again, more favourable to the buyer than the English law, because, according to the relevant rule of the Act,³⁹ whether the breach constitutes a repudiation of the whole contract or merely a severable breach has to be gathered from "the terms of the contract and the circumstances of the case", in

³⁶ (cont.)

bargain was at an end, and that it is too late to set up an answer to the purchaser's objection that the seller has now discovered that the defect may be remedied." (pp.274-275).

³⁷ R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.97.

³⁸ See, *Thorpe v. Fasey* [1949] Ch.649.

³⁹ s.31(2) of the Sale of Goods Act, 1893.

each particular case. In the latter case, i.e. of the severable breach, there is given a right to the party not in breach *"to a claim for compensation but not a right to treat the whole contract as repudiated"*.⁴⁰ Whereas by the Law,^{40a} as we have seen, there is given the right to the buyer *"to declare the contract avoided in respect of future deliveries or in respect of deliveries already made or both"*, provided that the buyer exercises his right of repudiation of the contract *"promptly"*, on one hand, and that the deliveries prescribed must be worthless for the buyer because of their interdependence, on the other hand. The above approach adopted by the common law courts is justified on the basis that *"repudiation of a contract is a serious matter, not to be lightly found or inferred"*, as Lord WRIGHT pointed out, in Ross T. Smyth & Co. Ltd. v. T.D. Bailey, Son & Co.⁴¹ In this case, also, the question whether the intention of the party in breach to repudiate the contract should be taken into account, was discussed and it was said that if this intention was related to the circumstances to be examined, in accordance with section 31 paragraph 2 of the Act, then it should be taken into account. Lord WRIGHT stated:⁴²

"I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and not in any other way. However, a mere honest misapprehension, especially if open to correction, will not justify a charge of repudiation."

Finally, in addition to the right of avoidance for apprehension that a future fundamental breach of the contract will be committed, and as

⁴⁰ s.31(2) of the Sale of Goods Act, 1893.

^{40a} ULIS Art.75(2).

⁴¹ [1940] 3 All E.R. 60, 71.

⁴² Ibid., p.72.

provided by the foregoing two Articles of the Law, 75 and 76, there is afforded the right to the innocent party to claim damages in accordance with the provisions of Articles 84 to 87. This principle is expressly stated in Article 77. Damages, moreover, may be claimed even if the contract is not avoided, in certain circumstances, but these will be governed by Article 82.

LIMITS ON THE RIGHT OF RESCISSION

In the course of discussing the subject of remedies afforded to the buyer by the system of Law for nonconformity of the goods delivered, it has been noticed that the most radical of them is the buyer's right to declare the contract avoided. But it is within the ambit of this work to examine, also, some rules laid down by the Law used as a restriction of the buyer's rights to this effect. These restrictions are of a practical semantic importance in this situation, for their purpose is to clarify the legal position of the parties as rapidly as possible so avoiding the suspension of their unclarified rights. It has been clearly emphasised through the preceding pages that the spirit of the Uniform Law on Sales, whenever it yields a right for remedies to the aggrieved party (at present the buyer), requires it to be exercised "promptly".¹

With regard to delay in bringing proceedings for want of conformity in the goods delivered the Law has established a period of limitation of one year, after the buyer has ascertained a lack of

¹ See Arts. 38 and 39 of ULIS.

conformity and had notified it to the seller in accordance with Article 39, unless the buyer has been prevented from bringing proceedings because of fraud on the part of the seller.² There were some disputes during the discussion of this Article in the Conference as to whether the period of one year should start to run from the delivery of the goods or from the notification provided by Article 39, and it was argued by the Federal Government of Germany that the former attitude should be adopted (as this was drafted by Article 51, paragraph 1 of the Rome Draft), on the basis that if the latter approach was accepted:

*"The link established between the start of the period and the declaration relating to defects entails the result that, in certain circumstances, and especially in the case of latent defects, the buyer could make use of his rights some years at least after the delivery, particularly rights to damages for a defective delivery. In commercial life, however, after a transaction has been carried out, it must be known as soon as possible if the matter can be considered closed or if it is necessary to take account of rights invoked on that occasion."*³

But contrary to this suggestion the opposite approach is adopted by the Law and the Special Commission expressed the opinion that the period of one year from delivery could be too short in dealing with goods in respect of which the buyer could not notify defects (latent defects) until several years had passed.⁴ After the expiration of the one year period inactive, as explained above, the buyer is prevented from relying on any lack of conformity even as a defence. This is the general rule of the Law to this effect, following in this case the plan of the Rome Draft. However, by exception to this rule, the defence of lack of

² ULIS Art.49(1).

³ RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.100.

⁴ Ibid., vol.II, p.62.

conformity can be exercised by the buyer against the seller's claim for payment of the price, provided that he (buyer) has notified these defects without undue delay as is required by the relevant rule of Article 39. In this event he may counterclaim for a reduction in the price or claim damages in his defence, but the buyer is excluded from any claim for avoidance of the contract or for defects to be remedied or replacements to be sent. It is manifestly, also, defined by the text that the buyer may only exercise these rights as a defence where he has not paid for the goods, otherwise he loses even this last remedy.⁵

The above mentioned provisions of the Law are prevailing, in case the period of limitation under municipal laws is shorter, as rules of *lex specialis*, and prevent the seller from invoking the defence of limitation before the expiration of one year after giving notice.⁶

The limitation of one year was thought to be enough to clarify the legal positions of the parties, because if the buyer had not claimed avoidance of the contract within this period he has agreed to keep the goods, and he can only after that make use of the above described subsidiary remedies.

The practical working of the Sale of Goods Act, 1893 is found not to be in line with the above described policy of ULIS in respect of the same matter, where any right may be enforced by an action. The relevant provision of the Act reads:

⁵ ULIS, Art.49(2).

⁶ See, R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.81.

"Where any right, duty or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action." ⁷

The buyer is restricted as to the time to exercise his rights only under the Limitation Act.⁸

On the other hand, the question whether the buyer in a sale contract was affected by the other party's fraudulent behaviour in starting proceedings to bring an action to exercise his right, is a matter of construction of the contract by the court in which such a problem is brought for discussion. If, for example, the seller in bad faith⁹ promised the buyer that he would replace or repair some of the defective goods delivered, this is a fact to be taken into account with the surrounding circumstances in which such a promise was given, the terms of the contract itself and the intention of the parties.

A second case including limits on the buyer's rights for rescission of the contract is found in Article 74 of ULIS under the heading "exemptions". This rule includes the principle of "frustration"

⁷ Sale of Goods Act, 1893, s.57. But see, also, s.62 where is given the definition of the term "action"; the interpretation of this term is different in English and Scots law. Under s.62(1): "Action" includes counterclaim and set off, and in Scotland "condescendence and claim and compensation".

⁸ The Limitation Act, 1939, s.2 (1)(a) and (2), provides that the period of limitation is six years for actions founded on simple contracts, whether verbal or written, and 12 years for actions arising from a contract expressed in a deed. But there are some exceptional circumstances to this principle. (See, C. SCHMITTHOFF, *supra*, p.20, note 17.) (This restriction applies only to England - not Scotland.)

⁹ This subject has been discussed in the second chapter of this work, (see, *supra*, p.112 *et seq.*).

of the contract and *force majeure*, and it has been drafted to be in line with most of the modern legal systems of the world, in the need to free the party in breach of a contract from his obligation when such a breach is the result of an act of government or of sudden catastrophe, e.g. *force majeure* or *Act of God*; but the concept of this principle in the Law (as will be seen) has a wider meaning. Moreover, Article 74 (1) takes on special importance in interpreting this rule; the intention of the parties at the conclusion of the contract, who may insert in their contract express clauses to that effect. If in the case there is not clearly an intention in the body of the contract, this will be inferred on the basis of the objective criterion of the general principle of the Law "*what reasonable persons in the same situation would have intended*",¹⁰ which will help the court or arbitrators to solve the relevant disputes. The intention of the parties is respected as far as it observes the general principles of the Law, as they are laid down by Articles 3 and 17, to the effect of exempting themselves from liabilities in exceptional cases of fundamental breaches in their contract. Article 74 specifically refers to the express intention of the parties and leaves to them wide freedom to exclude whatever circumstances they wish. The second sentence of paragraph 1 of Article 74, and also the whole of paragraph 2, it is submitted, have been drafted to be applicable when the situation is not covered by express exemption clauses. This approach is in line with that of the common law system. A solution was reached, according to the intention of the parties, in U.G.S. Finance Ltd. v. National Mortgage Bank of Greece and National Bank of Greece S.A.,¹¹ approved in

¹⁰ ULIS, Art.74(1).

¹¹ [1964] 1 Lloyd's Rep.446.

Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale.¹²

In international transport, international conventions have widely unified the law of carriage by sea, air and road, which have been broadly incorporated practically in almost all national legal systems, and there is a wide agreement on the exceptions and quantitative limitations that are applicable.¹³ Article IV, rule 2, of the Hague Rules in the Carriage of Goods by Sea Act, 1924 which, as amended by the Carriage of Goods by Sea Act, 1971 (not yet in force) following a Protocol signed at Brussels on February 23, 1968, deals with the immunities of the carrier and provides a list of seventeen exceptions, of which the last is of general form, exempting the carrier in all cases where neither he nor his servants are at fault.¹⁴

In Continental European laws, which are influenced a great deal by civil law principles, the situation is not quite clear and these problems are solved on the basis of the doctrines of impossibility and change in the "*basis of the contract*". The operation of the legal systems just mentioned is based on the concept of fault, and if it is found that the breach is intentional or due to gross negligence of the seller, as we have seen, the exemption clauses are inoperative. The

¹² [1967] 1 A.C.361; [1966] 2 All A.R.61.

¹³ The Czechoslovak International Trade Code, one of the modern and best enactments in the International Commercial Law, classifies the impossibility of performance of a contract to the following three steps: (a) "*subsequent impossibility*" (ss.245-250), (b) "*force majeure*" (s.252), and (c) "*frustration*" (s.275).

¹⁴ Article 388 of the Greek Civil Code under the heading "*unexpected change of the circumstances*", is of this character.

common law concept of the bargain, which is applicable to the international sales in English law, is found to be more realistic, as a compromise, balancing in a rather suitable way adherence to liabilities and freedom to provide exceptions.^{14a}

The second paragraph of Article 74 of ULIS regulates deviation from the contract obligations where they "*constituted only a temporary impediment to performance*". This rule provides that in such a case the party in default shall be freed of his obligations so giving him a right to repudiate the whole contract; but the practical working of this right on the part of the party in breach is under the restriction of the following limitations: (a) that there had not been expressed an opposite intention of the parties to that effect in the contract, and (b) that "*performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract*".¹⁵ This second clause includes an objective criterion which needs to be construed fairly by the courts, and corresponds to the British concept of fundamental breach, as this had been broadly discussed in the two cases cited above.¹⁶ It is suggested, also, that the general spirit

^{14a} See, G.A. ZAPHIRIOU, *European Business Law*, ed. by SWEET & MAXWELL (1970), p.64.

¹⁵ ULIS, Art.74(2).

¹⁶ *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C.361; [1966] 2 All E.R.61; *U.G.S. Finance Ltd. v. National Mortgage Bank of Greece and National Bank of Greece S.A.*, [1964] 1 Ll.Rep.446. See also *The Angelia* [1973] 1 W.L.R.210; *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B.26. In the latter case was stated that whether a breach is fundamental or not may depend upon economic circumstances, i.e. whether a breach is fundamental or not depends upon the circumstances under which the breach arises.

of the Scots law, in contracts generally, is that the parties to a contract are excused further performance of their obligations if some event occurs during the currency of the contract without the fault of either party. This event to be effective must make further performance impossible, or illegal, or make it something radically different from what was originally undertaken.^{16a}

Finally the third paragraph of the above rule makes clear that the application of this Article is not spread throughout the whole system of the Law unreservedly, i.e. does not affect the right of the parties to avoid the contract under rules of other Articles in the Law, or to reduce the price, *"unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible"*. This principle must be interpreted in relation to the general spirit pervading the system of the Law making it a law of non-mandatory rules and so respecting the freedom of the parties whenever they decide to exclude its rules from their contract as a whole or in a part.¹⁷ There is a difficulty to be defined as to who are the persons for whose conduct the party in breach is responsible, as has been said in the examination of Article 35 above;¹⁸ the Law uses the same expression in Articles 79 (2) (d) and 96, and an answer must be found through the general principles of ULIS extracted from Articles 17 and 9. Finally, it must be mentioned that in Article 74 (3) there is used, obviously by a clerical mistake,

^{16a} See, Taylor v. Caldwell (1893) 3 B. and S. 826; Tay Salmon Fisheries Co. Ltd. v. Speedie, 1929 S.C.593; Fraser & Co. v. Denny Mott & Dickson Ltd. 1944 S.C. (H.L.) 33. Cf. Sale of Goods Act, 1893, s.7.

¹⁷ See Art.8 of ULIS.

¹⁸ See, *supra*, pp.74-75.

the term "*include*" instead of the originally correct term "*exclude*".¹⁹

A third case imposing limits on the buyer's right of rescission is found in Article 79 which supplements Article 78, dealing with the "*effects of avoidance*". But the form of this Article, which includes five exceptions to the rule concerning this matter, creates difficulties in its classification because a quick look at it gives the impression that it would be more reasonable for it to have been classified in the provisions concerning cases for possibilities afforded to the buyer in repudiating the contract. However, the intention of this rule is to establish a duty even on the innocent party to take feasible steps to preserve the goods from damage for the benefit of the seller under the pain of depriving the buyer of his right to return the defective goods if they are not in the condition in which he received them. There is a series of exceptions to this rule, as has been said. The complete wording of Article 79 is as follows:

1. "*The buyer shall lose his right to declare the contract avoided where it is impossible for him to return the goods in the condition in which he received them.*"

¹⁹ This provision in the equivalent Article 85, para.3, of the 1956 Draft, reads:

"The exemption contemplated by this Article on behalf of one of the parties shall not exclude (emphasis added) the avoidance ipso facto of the contract and shall not deprive the other party of his right, in accordance with this law, either to declare the contract void or to claim a reduction of price, where such remedies are provided for by this law, unless the obstacle which gave rise to the exemption was caused by the act or omission of such other party or of some person for whom he is responsible."

(See this text in INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, vol.7 (1958), p.17.) Apparently this provision was more detailed in the Draft of 1956 than it is in its present form.

2. Nevertheless, the buyer may declare the contract avoided:
- (a) if the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance;
 - (b) if the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in Article 38;
 - (c) if part of the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered;
 - (d) if the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is not responsible;
 - (d) if the deterioration or transformation of the goods is unimportant."

It is obvious that the operation of this Article with its divergencies will put a difficult task on the courts when they try to cope with the solution of such disputes. *Quaere*, whether so many exemptions from the buyer's duty in this event can ensure a reasonable preservation of the goods for the benefit of the seller. This complexity in the subject under examination is justified only by the nature of the problems mentioned in the field of sale law, although

"much of the bulk of the Uniform Law - and considerable expenditure of time at the diplomatic conference - resulted from the attempt to deal in detail with the scope of the buyer's remedy of rejection".²⁰

In addition the following Article 80 provides in favour of the buyer that even though he has lost the right to declare the contract avoided on the basis of the reason which has been noted above, he retains all the other rights conferred on him by other rules of the Law,

²⁰ See J. HONNOLD, *supra*, p.343.

such as the right to claim damages, the right to reduce the price in a relevant proportion, etc. Finally, Article 81 lays down a useful provision governing in detail the divergent interests of the parties arising from the operation of the preceding rules dealing with the effects of avoidance,²¹ as illustrated above.

THE REDUCTION OF THE PRICE

Under the general rule of ULIS dealing with remedies available to the buyer for a breach of an obligation of the seller as to conformity of the goods, one of the remedies afforded to the buyer is the right to reduce the price.¹ This is an alternative right granted to the buyer instead of his rights to require performance of the contract or to declare the contract avoided, which have been examined in the foregoing pages of the present chapter. Further, the Law gives details in the practical working of this remedy in Article 46 of ULIS, which is an elaboration of this principle. Article 46 lays down the operation of the buyer's right in a rather explicit way,² which reads as follows:

²¹ ULIS Arts. 78-80.

¹ Ibid. Art. 41(1)(c).

² The Draft of 1956 was not sufficiently clear in its formulation and some suggestions were submitted to the Commission by delegates of the various Governments. The rule was contained as a whole in the general provision of Art. 50(b), which was the counterpart of Art. 41(1)(c) of ULIS and which was the only provision in the Draft dealing with this subject. This rule was giving the buyer the right

"(b) to reduce the price by an amount corresponding to the diminution which the lack of conformity has caused in the value of the goods as of the time of the conclusion of the contract, without prejudice to any claim to damages under the provisions of Article 94."

"Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract."

According to this provision the reduced price payable by the buyer must be calculated on the basis of the proportion between the actual value of non-defective goods at the time of the conclusion of the contract and the value of the defective goods as they have in fact been delivered. The exercise of this right is related to the other two preceding main remedies of the buyer, i.e. specific performance and the avoidance of the contract, but can not co-exist with them. The buyer cannot claim specific performance or declare the contract avoided and, at the same time, reduce the price in proportion to the defects of the goods sent or delivered to him. Instead he can only keep the goods at a reduced price. From the provision of the Law under examination³ it is obvious enough that this subsidiary remedy is afforded to the buyer only in the case when the non-conformity of the goods constitutes a fundamental breach of the contract. Difficulties only can appear in the construction of this provision in relation to cases where the seller retains, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or otherwise remedy the defects, as provided by Article 44 (1) of ULIS. Has the buyer in this case the right to exercise his above remedy against the seller immediately, i.e. of the reduction of the price in the relevant proportion, so preventing the seller from

³ ULIS Art.46.

remedying the defective goods? The answer to this question is found, possibly, in the above mentioned provision in Article 44 (1), which requires that the right of the seller "to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over" must be exercised when it does not cause the buyer "either unreasonable inconvenience or unreasonable expense". Thus, the buyer cannot unreasonably prevent the seller from making good defects by exercising an immediate claim for reduction of the price in this case, and in the remarks of Prof. GODENHIELM on this question:

*"It does not seem possible to block immediately the seller's fundamental right to supplementary delivery by the buyer's demand for a reduction of the price."*⁴

The problem, also, whether there is a reasonable or unreasonable inconvenience for the buyer to wait for supplementary remedies of the defective goods on the part of the seller, is a matter of construction of the whole contract and the courts, to give a fair solution in such a dispute, must examine the circumstances of the specific contract in a careful manner, particularly in contracts of international sale of goods, where such remedies or supplementary deliveries create special difficulties due to the big distance between the seller's and buyer's places of dealing. Hence, of more practical importance is the provision of paragraph 2 of Article 44, which provides for an additional period of time to be granted to the seller by the buyer in order to remedy the defect in the goods, and if he does not do so within this

⁴ B. GODENHIELM, "Some Views on the System of Remedies in Uniform Law on International Sales", in SCANDINAVIAN STUDIES IN LAW, vol.10 (1966), p.29.

period the buyer can exercise his right of reduction of the price without any dispute.⁵

As regards the question of the operation of this remedy it depends on a number of circumstances relating to a particular case, for example, the terms of the contract itself or the custom of the trade, which will specify the way of payment. But if the seller has already received payment before the buyer exercised his right of reduction of the price, it will be difficult for him (buyer) to obtain the relevant amount of the reduced price.⁶

Finally it will be noted that the present remedy adopted by the Law is not unfamiliar in other legal systems. In the Roman Law it was one of the basic remedies in the practical working of the sale contracts, and it was known as the action *quantum minoris aestimatoria*.⁷ Under the French Law it is known by the term *action estimatoire*,⁸ while in German Law it is called *Minderung*.⁹ The Greek Civil Code has preserved this remedy under the term "*diminution*

⁵ But, see comments on this subject, by R. GRAVESON, E. COHN, D. GRAVESON, *supra*, p.80, where it is suggested:

"The right to reduce comes into existence by reason of the lack of conformity: it can be exercised immediately. The buyer need not attempt to obtain performance."

⁶ See, B. GODENHIELM, *supra*, p.30.

⁷ See ZULUETA, *The Roman Law of Sale*, p.47.

⁸ Art.1644 of Code Civil.

⁹ German Civil Code, s.462.

of the price".¹⁰ In the Sale of Goods Act, 1893 there is a rule providing for "*diminution or extinction of the price*",¹¹ but the practical working of this seems to be different from that of the Law's rule (and its equivalent of the Civil law countries' legal systems). This is a remedy for a breach of warranty and not an alternative remedy for a breach of a fundamental term in a contract sale. Indeed, where the buyer sets up the breach of warranty in diminution or extinction of the price he claims, in fact, damages for breach of warranty which he sets off against the seller's claim for the price,¹² and this fact has nothing to do with the repudiation of the contract. The American Uniform Commercial Code¹³ seems to follow the policy of the Act closely, the buyer being able to recover damages whether or not he is entitled to repudiate the whole contract.

CLAIM OF DAMAGES

We saw that the system of the Uniform Law on Sales, following the common law approach, has afforded an additional remedy to the buyer regarding problems of nonconformity of the goods, namely, the right to

¹⁰ The Greek Civil Code devotes three Articles to this subject (Arts. 540-542) which are connected under the heading "*Retroversion of the sale or diminution of the price*". According to these rules the buyer, if the goods handed over have actual defects or they are not of the peculiar nature contracted for, has the right to demand either the retroversion of the sale or diminution of the price (Art.540). For the same reason the buyer can ask for a further diminution of the price or the retroversion of the sale, for other relevant defects later revealed. But the court has the power to adjudge only a diminution of the price, in an action brought by the buyer for a claim of retroversion of the sale if in the court's discretion and according to the circumstances the retroversion of the sale is not justified (Arts.541-542).

¹¹ s.53(1)(a).

¹² See, C. SCHMITTHOFF, *The Sale of Goods*, 2nd ed., p.193.

¹³ UCC. s.2-711.

make a general claim for damages, not only when the contract is avoided for a fundamental breach, but also when the contract is not avoided. For the latter case, i.e. where the contract is not avoided, the buyer can recover for damage which he has suffered for loss which is not the direct consequence of the non-performance of the contract but which has been occasioned by this non-performance,¹ as provided by the relevant rules incorporated in this part of the Law. Apart from these scattered rules in respect of the subject of damages for both cases, i.e. for repudiated and non-repudiated contracts, the Law lays down, in another place, a series of supplementary rules and devotes to this effect eight Articles (82 to 89) classifying them in accordance with their special purpose, as follows:

- (a) Damages where the contract is not avoided (Articles 82 to 83);
- (b) damages where the contract ^{is} ~~has been~~ avoided (Articles 84 to 87); and
- (c) general provisions concerning damages (Articles 88 to 89).

These provisions refer to both the buyer's and the seller's remedies.

The drafting Committee in adopting the common law approach under which the buyer is entitled to claim damages where the contract is not avoided (Article 82) faced many objections from various participant governments, on the basis that this approach does not correspond to the practice of international trade. German commercial circles, in particular, (industrialists and exporters) rigorously insisted on the solution that the right to claim damages in respect of delivery of defective goods, should only be allowed to the buyer where there is a

¹ See, Comment of the Special Commission, in RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.72.

fault on the part of the seller. In support of this attitude they pleaded, also, that under the general conditions for delivery recommended by the United Nations Economic Commission for Europe for the exportation of capital goods, the liability of the supplier for damages depends on the existence of a fault, and even a gross fault.² It was argued also, that, particularly in the export trade to distant underdeveloped countries, it might occur that ill-founded claims for damages would be submitted amounting to sums which are very difficult to verify.³ Eventually, as has been said, the draftsmen decided to follow the common law principle, in this case, and their decision was supported by the majority of the civil law jurists connected with the Conference who favoured the solution as a model of unification. This provision is equivalent, to a certain extent, to the rules of section 53 of the Sale of Goods Act, 1893, providing remedies, in general, for breach of warranty; the term "warranty" is not known in the text of the Law and the gap left open for similar cases is filled by Article 82 of the Law which reads:

"Where the contract is not avoided, damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract."

² See, RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, pp.97-98.

³ See, Prof. K. ZWIGERT, *supra*, p.4, where he observes that there is no reason why the German export dealers should not be able to afford their customers the protection which English, American and Scandinavian exporters have afforded. In addition he points out that:

"In many cases the export dealer's risk to be sued for damages by a foreign buyer can be covered by insurance, and his expenses will be increased by the premiums only to a small extent. Moreover, the seller is free to exclude his liability for damages in case of breach of warranty by special terms in the contract, this course of action being taken at the present time by a great part of the English export trade."

The first sentence lays down the manner of calculating damages, where the contract has not been avoided, basing this calculation on the civil law notions of *lucrum cessans* and *damnum emergens*, with the exclusion of the unforeseeable loss by the party in breach, which is covered by the provision of the second sentence of this Article. It is clear that the Law puts limits on the damages which can be claimed, and the maximum of them must either have been foreseeable by the party liable at the time of the conclusion of the contract or should have been foreseen, on the basis of his special knowledge "in the light of the facts and matters" relating to the other party's situation. This criterion has been analysed sufficiently by the common law courts. In Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.,⁴ ASQUITH, L.J. giving an elaboration of the term "knowledge" on the basis of the rules formulated in the old case of the English courts Hadley v. Baxendale,⁵ stated:

"... Knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know 'the ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject-matter of the 'first rule' in Hadley v. Baxendale. But to this knowledge, which a contract-breaker is assumed to possess, whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside 'the ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional *loss also* ~~lost~~ recoverable." ^{5a}

⁴ [1949] 2 K.B.528, 539-40; [1949] 1 All E.R.997.

⁵ (1894) 9 Exch.341.

^{5a} [1949] 2 K.B.528, 539-540.

An illustrative example of this doctrine is that of Patrick v. Russo-British Grain Export Co.,⁶ where merchants bought some Russian wheat from the sellers at 56s.9d. per 480 lbs. It was a strain of wheat not generally available on the market and the merchants contracted to resell it at 60s.6d. The sellers failed to deliver the wheat and the court held the merchants entitled to damages for their loss of profit on the resale. It was known to the sellers that the merchants intended to resell the wheat so that loss of profit was clearly within the contemplation of the parties as a probable result of non-delivery.

In the case of the Law's relevant provisions formulating this doctrine which, as we have seen, is found in many places in the text, these are interpreted under the general rule of Article 13 which uses the objective standard-person placed in the same situation. The intention of this principle is, in particular in the measure of damages, to balance the opposite interests of the parties putting them financially in equal position. The practical purpose of this remedy for a breach of contract is, in general, to place the purchaser by monetary compensation, in the same position financially as if the contract had been duly performed,^{6a} or, in a better expression "*as far as money can do it, in as good a situation as if the contract had been performed*".⁷ The phrase in Article 82 "*sum equal to the loss, including loss of profit, suffered by the other party*", is used as a reasonable measurement in calculating damages of this kind based on the above mentioned classical principles of the Roman law *lucrum cessans* and *damnum emergens*,

⁶ [1927] 2 K.B.535; [1927] All E.R. Rep.692.

^{6a} See, MACKEURTAN'S, *Sale of Goods in South Africa*, by B. O'DONOVAN, 4th ed., p.265.

⁷ Per Lord HALDANE, in *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London*, [1912] A.C.673, 689.

corresponding to the majority of modern municipal laws. The equivalent to this principle in the Sale of Goods Act, 1893 is found in section 51 (2) which reads: *"The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract", or "from the breach of warranty"*.⁸

In breach by late delivery the buyer will be entitled to the difference between the market price at the time when the goods ought to have been delivered and the lower market price of the goods when they had actually been delivered, plus other damages (for example, for loss of profit or use, etc.). In Wertheim v. Chicoutimi Pulp Co. Ltd.,⁹ the seller contracted to sell wood pulp to the buyer but he was late in delivering the goods. The market price when the goods ought to have been delivered was 70s. per ton, and when the goods were in fact delivered the market price had fallen to 42.6d. per ton. Later the buyer resold the goods at 65s. per ton. The Privy Council allowed the buyer only 5s. per ton as damages. This decision was approved by the House of Lords in Williams Brothers v. Ed. T. Agius Ltd.¹⁰ In the latter case the sellers sold the buyers coal at 16s.3d. per ton. The buyers resold the same coal to a sub-purchaser at 19s. per ton. At the date when delivery was due the market price of the coal was 23s.6d. per ton. The sellers failed to deliver, and in an action for damages for non-delivery the House of Lords held that the true measure of the buyers' damages was 7s.3d. per ton and not 2s.9d. per ton.

⁸ s.53(2) of the Sale of Goods Act, 1893.

⁹ [1911] A.C.301; [1908-10] All E.R.707.

¹⁰ [1914] A.C.510.

The Law also defines the method of claiming damages for the avoidance of the contract in case of fundamental breach, in Article 84. According to this provision damages are calculated by the difference between the price provided in the contract and the current price at the date of the avoidance, that is to say, the day on which the avoidance could have been declared or on which it occurred automatically. The former Draft had adopted a different approach to this subject based on that of the Rome Draft, but the Special Commission in the Conference thought that it would be preferable to accept the present approach, on one hand, because the day of avoidance corresponds to the practice most usually followed and, on the other hand, because the party who has the power to declare the avoidance should know at that time what damages he will receive if he avoids, while the amount of the damages would be unknown if it was settled on the day following the date of avoidance, as was provided in the former Draft.¹¹ On the contrary, the Sale of Goods Act, 1893 takes the opposite approach, that where the repudiation is before the date of delivery and is accepted by the seller, the market price is that obtaining at the date of the repudiation; but if the buyer treats the contract as still subsisting the price is that at the date of the seller's refusal to deliver.¹²

¹¹ See, comments of the Special Committee, in RECORDS AND DOCUMENTS OF THE CONFERENCE, vol.II, p.73.

¹² See, Campbell Mostyn (Provisions), Ltd. v. Barnett Trading Co. [1953] 1 Lloyd's Rep.268. However, the equivalent rule of the Act, s.51, para.3 is so similar to that of the Law "that the rule laid down in the Law appears to be a mere paraphrase of the two identical sub-sections", as A. SZAKATS observes, *supra*, p.765. This provision of the Act reads:

"Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or, if no time was fixed, then at the time of the refusal to deliver."

The second paragraph of Article 84 is concerned with the place to be taken into consideration in determining the current price. This problem gave rise to a controversial discussion at the Conference and there was sent by the Commission a questionnaire to the experts of the participant countries to give a reply on the basis of Article 15 of the Rome Draft.¹³ The Commission at the beginning adopted the scheme recommended in the Swedish reply putting the market in the place to which the buyer would go in the ordinary course of his business, for a purchase for replacement, and in regard to the resale the seller's relevant place. Finally the rule of Article 84 (2) was drafted in its present formulation, according to which the current price to be taken into consideration shall be that prevailing in the market of the transaction. But if there is no such current price in the market of the parties' transaction or the existing price is not suitable because, for example, it has been temporarily increased in the particular place so as to be unfairly applicable in the circumstances, the Law gives the judge the power to adapt the rule *in concreto*, in accordance with certain circumstances, using the price of the market "*which serves as a reasonable substitute*". Whilst this possibility of reasonableness has been left to the court's discretion by the aforesaid rule, the similar expression used in the following Article 85 imposes a duty on the parties in the case of buying goods in replacement or resale, respectively, who have to do it "*in a reasonable manner*", as vigilant businessmen in accordance with commercial practice in order to recover the differences between the contract price paid or obtained (depending if he is the buyer

¹³ The text of Article 15 of the Rome Draft was:

"A market price is the price on the market to which the buyer would resort in the ordinary course of business to satisfy his requirements of the class of goods envisaged."

or the seller). This is the first exception to the calculation of damages established by Article 84 and the results of the parties' negligence to take the reasonable steps are the same as those provided by the general rule of Article 88. According to the latter Article's provisions the party who complains of the non-performance of the contract is bound to take all reasonable steps to mitigate the loss suffered; failure to do so leads to a reduction in the damages he may recover.¹⁴ The second exception to the calculation of damages, when the contract is avoided, is introduced by Article 86, according to which damages can be carried to the full amount of the loss suffered or the profit lost from sub-purchases or other reason, whenever the party in fault knew or ought to have known of the event from which the loss results, for example if the seller was aware of the resale as an event or even as a possible event. It is submitted that this Article is concerned with a type of remedy provided against the party who has been able to calculate in advance the loss which the non-performance of his duties would cause to the other party. In this case the aggrieved party has to prove that at the time of the conclusion of the contract the defaulting party, if he had acted as a reasonable businessman would have foreseen the possibility of the results, for example, the possibility of sub-contracts.

Under the Sale of Goods Act, 1893 this exception applies in particular to the so-called string contracts, which occur where it is evident to the seller that the buyer contemplates the resale of the same goods which he bought from him,¹⁵ and then the *prima facie* test

¹⁴ See, Houndsditch Warehouse Co. Ltd. v. Waltex Ltd., [1944] 2 All E.R.518.

¹⁵ See, Prof. C. SCHMITTHOFF, *supra*, p.181.

of the market price, established by section 51 (3) of the Act, is inapplicable; and as SCRUTTON, L.J. pointed out, in James Finlay & Co. v. N.V. Kwik Hoo Tong H.M.:¹⁶

"In cases where A sells to B, then B to C, and so on through the alphabet . . . it may be said to A that he must have contemplated that B would sell to C, and so on, and, as far as I can understand, Hall v. Pim (Junior) & Co.¹⁷ can only be reconciled with Williams Bros. v. Agius¹⁸ by saying that it was founded upon the fact that the contract entered into by the seller contemplated a series of string contracts with sub-purchasers, and so A must be taken to have contemplated that the result of his breach of contract with B might lead to claims on B by sub-purchasers."

But if there is an available market in which the buyer can obtain substitute goods to satisfy his sub-purchasers the seller may prove not to be liable for the loss of profit of the buyer. In Lesters Leather & Skin Co. Ltd. v. Home & Overseas Brokers,¹⁹ there was a sale of 10,000 snakeskins from India "c.i.f. a United Kingdom port". On arrival at Liverpool the snakeskins were rejected by the buyers as unmerchantable. The buyers bought a small quantity of dressed skins which were available and they could at considerable inconvenience and delay have sent out to India to buy replacements for the rest of the consignment. When the buyers brought an action for damages for loss of profit, it was held that they were entitled to recover. If there had been any skins in any United Kingdom port, it would have been the duty of the buyers to purchase them, but they were not bound to send out to India. The result might have been different if a fresh consignment could have been obtained in a very short time, e.g. if it had been a shipment of wine from Bordeaux, as Lord GODDARD, C.J. indicated.

¹⁶ [1929] 1 K.B.400, 411.

¹⁷ R. & H. Hall Ltd. v. W.H. Pim Junior & Co.'s Arbitration, [1928] All E.R. Rep.763.

¹⁸ [1914] A.C.510.

¹⁹ (1948) 82 Ll.L.Rep.202 (C.A.).

Where the contract is avoided for a fundamental breach and there is no current price for the goods at all, and at the same time there is no reasonable substitute market, the damages are then calculated exactly as when the contract is not avoided; in other words, the damages in this case are equal to the loss actually suffered and the profit lost without exceeding the loss which results from the events which the party liable in damages knew or could have known at the time of the conclusion of the contract. This solution is explicitly given by Article 87 of the Law which refers to the test of calculation of Article 82 (*"shall be calculated on the same basis as that provided in Article 82"*).^{19a} This question is answered in a rather similar way by the English courts, when there is no market for the goods in question. In these cases the general rule of section 51 (2) comes into operation instead of that of the section of 51 (3).²⁰

^{19a} The draftsmen thought in this case to give this brief form in Article 87 and they avoided repeating the way of measurement in detail, as they had done in the case of the counterpart to this rule, Article 99 of the Draft of 1956.

²⁰ In Société Co-Op. Suisse des Céréales et Matières Fourragères v. La Plata Cereal Co., S.A., (1947) 80 Ll.L.Rep.530, a case where delivery f.o.b. was prevented as a result of an export ban imposed by the Argentine Government having monopolised the grain trade, the sellers were by law prohibited from exporting any maize that they had not purchased from the Argentine Agricultural Products Regulating Board, and that Board had no maize which they were willing to sell, although the sellers had an amount of 6,750 tons of maize which became illegal for them to export. It was held that the Argentine seller was liable in damages, although he was relieved from his duty to deliver maize f.o.b. Buenos Aires. According to the observations of MORRIS, J. the damages had to be measured by the difference between the contract price, and the internal price of the goods in the Argentine plus the f.o.b. charges relating thereto on the date of default. It was his view that in a case such as this where no market exists by virtue of an export prohibition, section 51 (3) of the Act was inapplicable and damages should be assessed by reference to the more general provisions of section 51 (2).

Finally, there was another question discussed in the Conference related to the problem of damages: the damages to be paid in the case of an anticipatory breach of contract. In the Draft of 1956 Article 100 was established to this effect giving the relevant solutions in detail. The final text of the Law has not included any provision as regards to this problem and, therefore, the general principles relating to damages will be applied to this effect, that is to say, damages for anticipatory breach will be measured in the same manner as for a breach on due date.

The common law judicial practice has established the applicable principle in calculating damages for anticipatory breach, in the leading statement of COCKBURN, C.J., in Frost v. Knight,²¹ which is as follows:

"The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

In this case the buyer is entitled to claim as damages the difference between the contract price and the market price at the time when the goods ought to have been delivered. If the latter price is no more, or even less, than the former, then the buyer cannot claim anything because the damages are recoverable in that case. The aggrieved party in this case is under a duty to mitigate the damages, otherwise

²¹ (1872) L.R.7 Ex.111, p.112.

the above mentioned market price test of calculation is inapplicable. In Melachrino and Another v. Nickoll and Knight,²² where the court was dealing with a case in which, on the date when the seller repudiated and the buyer accepted the repudiation, the market price was above the contract price, but during the period of expected delivery the market price was below the contract price, BAILHACH, J. dismissed the buyers' allegation that damages should be assessed with reference to the market price ruling on the date on which the anticipatory breach was accepted. He was of the opinion that the date on which the shipment would have arrived in England had the contract been performed was the proper date for assessing damages, and he made the point that the damages²³

"must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract . . . To this rule there is one exception for the benefit of the defaulting seller - namely, that if he can show that the buyer acted unreasonably in not buying against him the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages."

It is obvious that the duty to prove that if the aggrieved party has acted somehow differently or had taken a certain course, his loss might have been less than it eventually is, falls on the defaulting seller. But the duty to mitigate damages does not oblige the party not in default to take any action which would seriously damage his commercial reputation;²⁴ such duty must not cause the buyer either unreasonable inconvenience or unreasonable expense.²⁵

²² [1920] 1 K.B.693; [1918-19] All E.R.Rep.857.

²³ Ibid., p.699; Ibid., p.859.

²⁴ See, James Finlay & Co. v. Kwik Hoo Tong, [1929], 1 K.B.400.

²⁵ See, Lesters Leather & Skin Co. Ltd. v. Home & Overseas Brokers, discussed above at p.170.

The final Article in the unit under examination is Article 89, which deals with damages in relation to fraud cases. According to this rule this category of damages has been left out of the Law provisions to be solved by municipal courts, which also will define the term "fraud". This solution was thought preferable by the Conference on the ground that it would be impossible to formulate absolute rules for such a complex problem, which is faced in a semantically different way by the various legal systems.

CONCLUSIONS

C O N C L U S I O N S

The unification of the law in the area of the international sale of goods having been an urgent requirement over centuries in international commercial life, became a reality with the two Hague Conventions of 1964. The future of these Uniform Statutes will depend on how much this endeavour of leading international lawyers and distinguished jurists, will be appreciated by the various nations which adopt the Uniform Laws as a workable legal system in their States. The Uniform Laws have, unhappily, been ratified by only a few countries up till now, and this fact creates difficulties about the future of this new international act, although, as has been shown throughout the investigation of the relevant problems in the present study, the Law is an effective and well-established legal system giving to some questions fairer and more realistic solutions than other modern legal systems. It has been pointed out, on the other hand, that as a human creation has its own gaps and weaknesses in formulation and it cannot be maintained that is a perfect legal creation; but the accession to the Uniform Laws of as many States as possible and the application of them by the various national courts, will result in these weak points which require a change being located. However perfect a legal creation, it seems to be merely a dead letter in a book of statutes before its commencement in application by those for whom it has been made.

There have been underlined some difficulties with regard to the preferable method of construction of the Law by municipal courts and

it has been emphasised that national courts must face this problem in good faith on the basis that their efforts in regard to this difficult task must be focussed in the direction of disclosing the real intention of the contracting parties and giving a sound international sale contract, free from defects, irrespective of which theoretical method will be followed to this purpose. This fact has, particularly, been emphasised in the cases where the competent courts are bound to resort to commercial practices, or usages, or to their own laws to give solutions in problems left outside the scope of the Uniform Laws, or for covering existing gaps at certain points, in order that there may be achieved a harmonisation in the practical working of this legal system at a global level.

Similarly the same broader approach must be adopted in the interpretation of the most crucial problem in a sale contract that which concerns the obligations of the parties, especially those of the seller as to conformity of the goods (quantity and quality), as being the centre of gravity in the divergent financially opposite interests. The elements of moral behaviour in the relations of the contracting parties, it is suggested, is not an empty phrase in the Law which follows this policy, as has been seen, to a broader extent in its generalised formulations throughout its established construction (good faith with fair dealing which is required from both sides, even prevailing with regard to the formation of the sale contract;¹ duty of the buyer to examine the goods and give notice "promptly" to the seller; limits on the buyer's right to declare the contract avoided; and other relevant issues).

¹ ULFIS Art.5(2).

The expectations that the goods sold must be in conformity, in the widest meaning of the term, with the contract and the provisions of the Law are considered only as such when they are substantial. The defective quantity and quality of the goods delivered have to be "material" in order to give ground for a relevant remedy. The remedies of specific performance, the buyer's right for a price reduction in relation to the value of the defective goods and especially the radical remedy of avoidance of the contract on the basis of fundamental breach, and also the subsidiary claim for damages, operate in the context of these restrictions. These problems have been analysed in the light of relevant examples from British judicial practice and some outstanding disputes in connection with them are underlined.

Apart from the conflicts already referred to, and the relevant solutions drawn from the appropriate provisions of the Law, relating to the subject of the present research, there is presented some comparative material taken from various legal systems those, in particular, on which the Uniform Law is based. Reference is often made, especially, to the corresponding solutions given by the Sale of Goods Act, 1893 as well as the influence of this statute on the Uniform Laws, with a number of cases mainly of the English and Scottish courts relating to the problems under examination. The main purpose of this research was to attempt an analysis of the rules relating to the seller's basic obligations as to conformity of the goods in an international sale contract, and to point out some important problems arising from these rules to this effect. However, the scope and complexity of the subject, together with problems arising from the limited legal literature and case law produced by a new statute, have resulted in this research being to some extent less complete than the writer had originally envisaged.

This subject needs a further extensive study at several points especially those relating to the remedies afforded to the buyer by the Law. Nevertheless, it is hoped that some light has been shed on this subject and it is hoped that it will give a stimulation for a further research in future.

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